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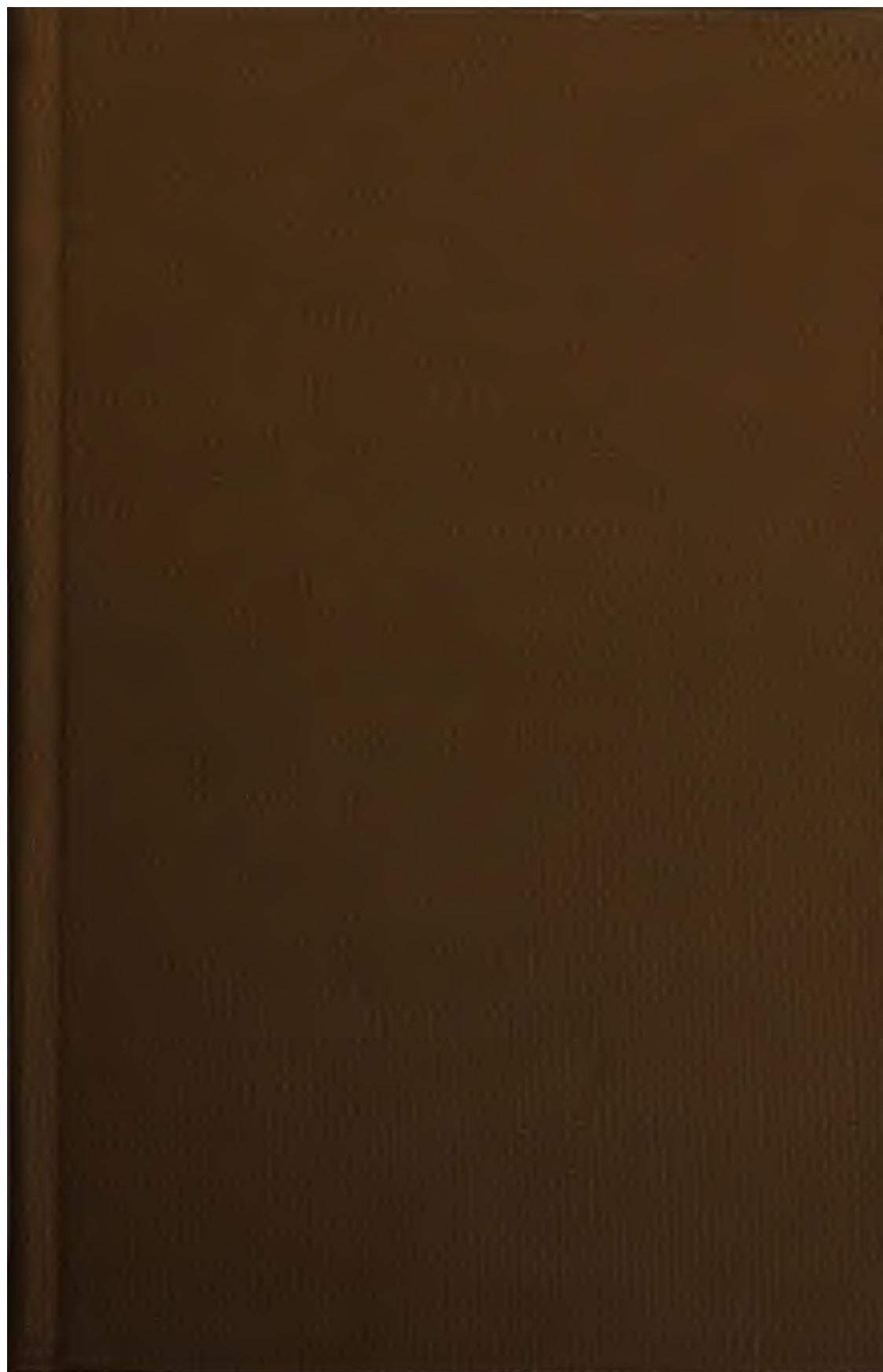
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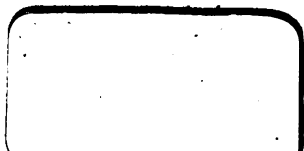
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R E P O R T S

OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

IN THE YEAR 1846.

~~~~~  
BY JAMES M. KELLY,

COUNSELLOR AT LAW AND STATE REPORTER.  
~~~~~

No. _____
VOL. Law Scho

CINCINNATI COLLEGE

NEW-YORK:

PRINTED BY EDWARD O. JENKINS,

No. 114 Nassau Street.

1847.



Entered according to the Act of Congress, in the year 1846, by

JAMES M. KELLY,

in the Clerk's Office of the District Court for the District of Georgia.

PREFACE.

THE Reports of the Supreme Court of Georgia, containing all the decisions of that Court, made during the year 1846, are now presented to the public in one volume.

The Reporter is apprehensive that he has been unable, notwithstanding the care that has been taken, and the labor and pains bestowed by him, wholly to avoid errors in its execution. But he is flattered by the hope and belief, that no mistakes or omissions, materially varying the sense, have escaped his scrutiny and correction. To his own exertions, in this particular, has been added the assistance of the publisher, and his proof readers, than whom few, if any, could be found, who understand their duties better, or discharge them with more fidelity.

The greatest fears entertained are, as to the references. It would be a matter very deeply regretted by the Reporter, to find cases referred to by the Court in its decisions, or by counsel in their arguments, incorrectly copied, and remaining still unnoted. To avoid this, a very competent gentleman has been employed to compare the cases cited with the reports from which they are taken, and to furnish a list with the proper corrections, of such as have not been truly set forth; and it is believed that all material errors of this sort have been detected. These corrections will be found in the proper place.

It has been found somewhat difficult to condense the statements of facts in the cases, as much as was desirable; and, in this particular, it is apprehended they may appear too prolix. But, as every principle of law, decided by the court, arose upon the facts sent up, the Reporter has felt it to be imperatively his duty, even at the expense of prolixity, to set forth a faithful narration, so as to present all the material facts in their proper connection.

He has embodied the arguments of counsel. In this he is aware that many valued friends, for whose judgments and opinions he entertains the highest regard, will disagree with him, looking upon it as a useless expense, and as an act of supererogation on his part. That he would most respectfully submit that, although the a-

counsel are not to be viewed as the law of the case, yet they are valuable to the profession, and the courts, in the aid they give in the investigation of those legal subjects to which they apply. Whilst, therefore, they may assist many, they can be prejudicial to no one. Most of those arguments, too, will be found to be highly interesting and instructive.

It will be perceived that the present volume is very heavily paged. Indeed, there are but few books of reports extant which contain as much matter to the page as this. The matter embodied was quite sufficient for two volumes, of respectable size, if the more modern style of publishing reports had been adopted. But the public seemed to expect but one volume, and, impressed with the belief that it would be more acceptable in the present form, he unhesitatingly adopted it.

In place of the usual heading at the commencement of each term, a summary has been substituted, setting forth the Terms of the Court held—noting the presence of the Judges, and exhibiting the names of Attorneys admitted at each Term, and their residences, as far as known to the Reporter.

The clause of the Constitution creating the Court—the Act of the General Assembly organizing it, and the Rules of the Court, are embodied. With regard to the Rules of the Court, they are embodied entire, without reference to the terms at which they were respectively adopted. The convenience of a ready reference suggested this course.

In conclusion, the Reporter would add that, although there are doubtless many imperfections in the execution of this work, yet he is consoled by the consciousness of having done his utmost to avoid them, and of having spared neither pains nor expense in order to accomplish a proper discharge of the official duties imposed on him by the law. And, should his efforts in this instance be acceptable to the Bench and the Bar of Georgia, he will esteem it his greatest reward.

JANUARY, 1847.

CLAUSE OF THE CONSTITUTION OF THE STATE OF
GEORGIA, CREATING A SUPREME COURT.

Article III.—Section I.

“ The Supreme Court shall consist of three judges, who shall be elected by the legislature for such term of years as shall be prescribed by law, and shall continue in office until their successors shall be elected and qualified, removable by the Governor on the address of two-thirds of both branches of the General Assembly for that purpose, or by impeachment and conviction thereon. The said court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors in law and equity from the superior courts of the several circuits, and shall sit at least once a year, at a time to be prescribed by law, in each of five judicial districts to be hereafter laid off and designated by the legislature for that purpose, at the most central point in such judicial district, or at such other point in each district as shall by the General Assembly be ordained, for the trial and determination of writs of error from the several superior courts included in such judicial districts. And the said court shall at each session in each district dispose of and finally determine each and every case on the docket of such court, at the first term after such writ of error brought; and in case the plaintiff in error in any such case shall not be prepared, at such first term of such court, after error brought, to prosecute the same, unless precluded by some Providential cause from such prosecution, it shall be stricken from the docket, and the judgment below shall stand affirmed.”

AN ACT to carry into effect that part of the first section of the third article of the Constitution, which requires the establishment of a Supreme Court for the Correction of Errors, and to organize the same, and to regulate the proceedings thereof.

SECTION FIRST. *Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same,* That in pursuance of the first section of the third article of the Constitution, there shall be, and it is hereby established, a Court for the Correction of Errors, to be called the Supreme Court of the State of Georgia. The said court shall consist of three judges, who shall be elected at the present session of the General Assembly—one for the term of six years, one for the term of four years, and one for the term of two years, during which terms they shall respectively hold their offices, unless sooner removed in the manner pointed out by the Constitution. No person shall be eligible to the office of judge, unless he shall have been duly admitted and licensed to plead and practice in the courts of law and equity in this State ten years &c

least prior to his election. The Governor shall, within twenty days after the election of said judges, commission them respectively for the terms for which they shall have been elected. In case of the death, resignation, or removal from office of any of said judges, the Governor shall appoint and commission some fit and proper person to fill such vacancy, until the meeting of the General Assembly next after such vacancy, when the General Assembly shall fill the same. And if any such vacancy occur during a session of the General Assembly, the same shall be filled at such session. Every judge of said court who shall be elected after the present session of the General Assembly, (except where he is elected to fill a vacancy,) shall hold his office for and during the term of six years, and shall be commissioned accordingly by the Governor.

SECTION SECOND. *And be it further enacted,* That the said Supreme Court shall be holden at the times and places following, to wit: on the second Monday in January and third Monday in June, in each year, for the First District, to be composed of the Eastern and Southern Judicial Circuits, alternately at Savannah and Hawkinsville. On the fourth Mondays in January and July in each year for the Second District, to be composed of the South Western and Chattahoochee Circuits, alternately at Talbotton and Americus. On the second Monday in February and August in each year for the Third District, to be composed of the Coweta and Flint Judicial Circuits, alternately at Macon and Decatur. On the fourth Mondays in March and September in each year, for the Fourth District, to be composed of the Western and Cherokee Circuits, alternately at Cassville and Gainesville. On the first Mondays in May and November in each year, for the Fifth District, to be composed of the Middle, Northern and Ocmulgee Judicial Circuits, at the City of Milledgeville.

SECTION THIRD. *And be it further enacted,* That it shall be the duty of all the judges of said court to attend at each term of said court; but if, from Providential cause, any one of said judges cannot attend a court, such court may be holden by two judges. If only one judge shall attend a court, it shall be his duty to open the court and to adjourn it to a day not more than two days beyond the regular term, at which time, if two judges do not attend, the court shall in that case be adjourned to the next regular term.

SECTION FOURTH. *And be it further enacted,* That the Supreme Court shall hear and determine, at the first term of each court, all such cases in law and equity as may be brought from any of the Superior Courts of this State, within the district as created by this act, for which said Supreme Court is holden. All causes of a criminal or civil nature may, for alleged error in any decision, sentence, judgment or decree of any such Superior Court, be carried up from the counties in the respective districts aforesaid, to the judges of the Supreme Court, at the respective terms thereof for such district, to be by the said Supreme Court revised and determined. Any criminal cause may be carried up to the Supreme Court on a bill of exceptions, in writing, specifying the error or errors of law complained of, to be drawn up by the party, his counsel or attorney, within four days after the date of the cause in which the decision or sentence has been had, and submitted to the judge of the Superior Court before whom such

criminal cause may have been tried, to be by him certified and signed. Any cause of a civil nature, either on the law or equity side of the Superior Court, may, in like manner, be carried to the Supreme Court on a bill of exceptions, specifying the error or errors complained of in any decision or judgment, to be drawn up by the party complaining thereof, his counsel, solicitor or attorney, within the time aforesaid, and submitted to the judge before whom the cause may have been heard, to be by him certified and signed; but in no case shall the facts be controverted in the Supreme Court so as to require attendance of any witness or witnesses under any pretence whatever: said Supreme Court shall hear and determine upon matters contained in the transcript of the record of the cause, and not otherwise. Upon exhibition of any such bill of exceptions to the judge of the Superior Court, it shall be his duty, if such bill of exceptions be true and consistent with what has transpired in the cause before him, to certify and sign the same. Such bill of exceptions shall operate as a supersedeas to the judgment, sentence, execution, or decree of the court below, in all cases where bond may be given or affidavit filed as hereinafter provided. If in civil cases, either in law or equity, the party complaining of error shall, within four days after the term, at which the exceptions were taken, pay all costs which may have accrued, and, either personally or by his agent, solicitor or attorney in fact or at law, give bond with security, to be approved of by the clerk of the Superior Court, and conditioned to pay the eventual condemnation-money and all subsequent costs; and if in a criminal case where the offence is by law bailable, the party complaining of error shall enter into recognizance, with security, to be in like manner approved, conditioned for the appearance in person of such party complaining, to abide the final order, judgment, or sentence of said court; and if the offence be not bailable, or if the party be sentenced to imprisonment in the Penitentiary, and be unable to give security as required, the judge of the Superior Court may order a supersedeas at the time of certifying and signing the bill of exceptions. When such bill of exceptions shall have been signed and certified by the judge of the Superior Court, and such bond with security shall have been given, or recognizance with security entered into and costs paid, notice of the signing of such bill of exceptions shall be given, if in a criminal cause, to the attorney or solicitor-general, and in civil causes in law or equity, to the adverse party or his counsel, within ten days after the same shall have been done, and shall be filed in the clerk's office where such bond or recognizance has been given, immediately thereafter, and on a copy of such notice being served by a sheriff, constable, or attorney of the Superior Court, and filed in the clerk's office with the bill of exceptions, it shall be the duty of the clerk of the Superior Court below to certify and send up to the Supreme Court a complete transcript of the entire record of the cause below, duly certified under his hand and seal of office, and also the bill of exceptions within ten days after he shall have received the original notice with the return of service thereon.

SECTION FIFTH. *And be it further enacted*, That the Supreme Court shall proceed at the first term (unless prevented by providential cause) to hear and determine each and every cause which may in manner aforesaid be sent up from the court below upon the record and bill

exceptions, on the ground therein specified, and on no other grounds. Upon the decision of the said Supreme Court on matters of law or principles of equity which may arise in the bill of exceptions, (which decisions shall always be in writing, and be delivered by the judges of the said court, *seriatim*, except in cases where they are unanimous,) the court shall cause to be certified to the court below such decision, and award such order and direction in the premises as may be consistent with the law and justice of the case; which decision, so rendered and ordered, and direction so awarded, shall be respected and carried into full effect by the court below. If the decision and judgment of the court below be for any sum certain, and be affirmed in the Supreme Court, the plaintiff may in the Superior Court enter judgment against the defendant and his securities for the amount of principal, interest and costs, as shall have been confessed, or found by a jury, and ten per cent. damages on the principal sum, and have execution immediately after the decision of the Supreme Court so certified as aforesaid: *Provided*, That if any one or more of the judges of the Supreme Court shall certify that in his or their opinion, such cause was not taken up for delay only, then and in such case, the damages shall not be allowed. Judgments in the court below, if affirmed, shall not lose any lien or priority by reason of the proceedings in the court above.

SECTION SIXTH. *And be it further enacted*, That if any judge of the Superior Court shall refuse to certify a bill of exceptions when properly tendered, or if any clerk shall fail or refuse to send up a transcript of the whole record in any cause, according to the provisions of this act, or he, or any sheriff shall refuse or neglect to perform any duties imposed upon him, by this act, said Supreme Court while in session in any district in this State, may issue a writ of mandamus to such officer, and enforce obedience thereto, if necessary, by attachment; and in case that such refusal by any such officer have delayed the party applying for, or tendering a bill of exceptions as aforesaid, beyond the time limited in the foregoing part of this act, he shall not thereby lose his remedy, but may proceed as if the time limited had not expired.

SECTION SEVENTH. *And be it further enacted*, That the sheriff of the county wherein the Supreme Court is holden, or his deputy, shall attend the sessions thereof, and obey all lawful orders, enforce all lawful commands, and execute all lawful processes of said court. And for the service of any process or order of said court, he shall receive the fees allowed for like service in the Superior Courts, to be taxed and paid in like manner.

SECTION EIGHTH. *And be it further enacted*, That each of the said judges of the Supreme Court shall receive a salary of \$2,500 per annum, to be paid as the salaries of the judges of the Superior Courts are now paid. The amount of said salary shall not be increased or diminished during the continuance of such judge of the Supreme Court in office; and no judge shall receive any other perquisite, reward, or compensation than the amount of his salary. Each and every judge of the Supreme Court shall, before the Governor of the State, and prior to his receiving his oaths, take the oath to support the Constitution, and other oaths required of the judicial officers of this State.

NINTH. *And be it further enacted*, That the said Supreme Court appoint some fit and proper person as clerk thereof, who shall

hold his appointment for six years, unless removed by said Court upon complaint made, and cause shown for incapacity, improper conduct, or neglect of duty. Said clerk shall keep an office at the seat of Government, in one of the departments of the capitol, where all books, records and archives, and the seal of the said court, shall remain. He shall attend all the sessions of said court, and obey all lawful orders thereof. He shall keep in substantial bound books fair and regular minutes of the proceedings of said court, a record of all its judicial acts, a docket of its causes, and such other books as said court may, from time to time, order and direct. He shall certify, when required, upon payment of his fees, all proceedings of the said court in the manner now in use in the Superior Courts of this State. And the record and minutes of said Supreme Court, and copies thereof, shall be evidence in the same manner and under the same circumstances as those of the Superior Courts now are: said Supreme Court being to all intents and purposes a Court of Record. The said clerk shall be authorized to appoint a deputy or deputies, in his discretion, he being responsible for the faithful performance of their duties.

SECTION TENTH. *And be it further enacted*, That if during the pendency of any cause in the Supreme Court, the security taken on the removal of said cause to the Supreme Court shall become insufficient or inadequate, by reason of removal from the State, insolvency, or otherwise, it shall be the duty of the Court so certifying said cause, on application on oath, setting forth the facts, showing the inadequacy of said security, from insolvency or otherwise, to require additional and other security, unless the appellant shall make an affidavit, under the seventeenth section of this act; and if the appellant shall fail or refuse to give such additional security, or make and file such affidavit, the Court below shall certify this fact to the Supreme Court, whereupon said suit shall be dismissed at the appellant's costs, and the judgment in the Court below shall be affirmed with costs.

SECTION ELEVENTH. *And be it further enacted*, That the said Clerk shall be entitled to the same fees as Clerks of the Superior Courts in this State, to be taxed as part of the costs, and for which the attorney of record shall always be bound.

SECTION TWELFTH. *And be it further enacted*, That some fit and proper person shall be elected by the judges of said court as reporter, who shall hold his office during the term of six years, unless sooner removed by the court, and shall receive for his services a salary from the State of one thousand dollars per annum. Said reporter shall attend all the sessions of said court, and report, in a proper and professional manner, all the decisions there made, with the reasons therefor, and he shall not, during his service as reporter, appear as counsel, or act as attorney in any case in any court in this State. The reporter shall, from time to time, publish in good and substantial form, the reports so made as aforesaid; and if at any time he shall neglect to publish, within four months after sessions for each year have closed, the decisions of that year, he shall forfeit one-fourth of his salary for that year, and another fourth for every additional month's delay: *Provided*, that if the judges of said court, or a majority of them, shall certify that such delay was not from any fault or neglect of the reporter himself, or those under his control, such forfeiture shall not be in-

ACT ORGANIZING THE SUPREME COURT.

The reporter shall also be allowed the copyright. *And provided further,* that he furnish, free of expense, and well bound, one copy of said reports to each judge of said court for the time being, one copy to the clerk of said court, to be kept in his office as public property, twenty-five copies to the State, to be delivered to his Excellency the Governor as soon as may be, said twenty-five copies to be disposed of as the General Assembly may direct, and a copy to each clerk of the Superior Court for each county in this State, to be kept in his office free for the perusal of any person.

SECTION THIRTEENTH. *And be it further enacted,* That the Clerk and Reporter of said court, before entering on the duties of their respective offices, shall be sworn to the faithful discharge of their duties, and take all other oaths prescribed by law for civil officers.

SECTION FOURTEENTH. *And be it further enacted,* That the Judges of said Supreme Court shall have power to establish rules of practice, and to regulate the admission of Attorneys in said Supreme Court, and to award all such process as may be necessary to enforce obedience to their orders and judgments, and as are usual in other appellate tribunals; and also to establish and procure a seal for said court.

SECTION FIFTEENTH. *And be it further enacted,* That in case plaintiff in error shall fail to cause the transcript of the record to be filed with the Clerk of the Supreme Court, at the place of holding said court, by the third day of the term next succeeding the time of granting the *superseas*, and the adverse party shall file with the Clerk of the Supreme Court a certificate of the granting of such *superseas*, signed by the Clerk of the Superior Court wherein the cause is depending, then it shall be the duty of such Supreme Court to affirm the judgment below on such certificate.

SECTION SIXTEENTH. *And be it further enacted,* That it shall be the duty of the Attorney or Solicitor-General of the Judicial Circuit wherein any criminal cause is tried, and which may be taken up in manner aforesaid, to appear and attend to said cause in the Supreme Court.

SECTION SEVENTEENTH. *And be it further enacted,* That whenever a party shall not be able to give security, he shall file an affidavit, stating that he is unable, from his poverty, to give the security for the eventual costs and condemnation money, and that his counsel has advised him that he has good cause for a writ of error, and upon filing the same in the Clerk's office, he shall be entitled to all the privileges which he would have had if he had given the security and paid the costs as required by this act. And when any party in any civil cause residing out of the county in which it may be tried shall not be desirous of obtaining a *superseas*, he shall be entitled to have his cause carried up to the Supreme Court under the provisions of this act, without giving bond or making affidavit as herein before provided; the adverse party being at liberty to proceed with execution.

CHARLES J. JENKINS,
Speaker of the House of Representatives.

ABSALOM H. CHAPPELL,
President of the Senate.

umber 10th, 1845. }
VORD, Governor. }

RULES OF COURT.

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JUDGES AND OFFICERS OF THE SUPREME COURT OF GEORGIA, WITH THEIR TERMS OF OFFICE, AND PLACES OF RESIDENCE.

The Hon. JOSEPH HENRY LUMPKIN, Athens, Georgia, elected for 6 years.

“ “ HIRAM WARNER, Greenville, “ “ “ “ 4 “

“ “ EUGENIUS A. NISBET, Macon, “ “ “ “ 2 “

JAMES M. KELLY, Esq., Perry, Ga., Reporter, elected by the Judges for 6 years.

ROBERT E. MARTIN, Esq., Milledgeville, Ga., Clerk, appointed by the court for 6 years.

The court have adopted the following rules:

RULES OF THE SUPREME COURT.

RULE I.

All attorneys who have been admitted to practice in the Superior Courts of this State, may be admitted to practice in the Supreme Court, on application: provided they shall exhibit to the Court satisfactory proof of good private and professional character, and pay to the Clerk of the Supreme Court the usual fee of five dollars, who shall issue to each applicant a license under the seal of the Court, upon each applicant taking and subscribing the following oath: *I ———, do solemnly swear, (or affirm, as the case may be,) that I will demean myself as attorney or counsellor of this Court uprightly and according to law; and that I will support the Constitution of the State of Georgia and the Constitution of the United States.*

RULE II.

The written recommendation of any one or more respectable members of the bar, certifying to the good private and professional character of an applicant for admission, shall be sufficient evidence of character, and will in all cases be required.

RULE III.

Any attorney from other States or Territories shall be admitted to plead and practice in this Court, who will produce satisfactory proof that he has been regularly licensed in the highest judicial tribunal of such State or Territory, and is at the date of his application a practicing attorney of the same.

RULE IV.

A brief of the oral, and a copy of the written evidence adduced in the Court below, shall be embodied in the bill of exceptions, and shall constitute a part of the same.

RULES OF COURT.

RULE V.

Every motion for any rule, order or judgment, shall be submitted to the court in writing by the counsel who makes it, and if granted, shall be handed to the Clerk.

RULE VI.

No paper belonging to the Clerk's office shall be taken therefrom without leave of the court; and when such leave is granted, the party receiving papers shall receipt to the Clerk for the same.

RULE VII.

All cases returned to this court shall be entered on the Bench docket and numbered, on or before the court meets on the first day of the term to which they are respectively returned, and the cases first received by the Clerk shall be first entered.

RULE VIII.

The Clerk shall furnish a transcript of the Bench docket for the use of the bar; and the Bench docket shall not be subject to inspection during the sessions of the court.

RULE IX.

All cases entered on the Bench docket shall be called and tried in the order in which they are there entered. It shall, however, be competent for the court, upon special cause shown, to set down a case for hearing out of its regular order.

RULE X.

The attorney who makes out and tenders the bill of exceptions, shall sign his name to the same, and shall be, with the counsel representing the case before this court, bound for costs.

RULE XI.

When cases are called for hearing, and there is no appearance by the plaintiff in error, the defendant may have the plaintiff called, and move the court to dismiss the writ; or may open the record and pray for affirmation of the judgment; and in case the writ is dismissed, or the judgment affirmed, the plaintiff in error shall pay the cost; and should the defendant fail to appear, then the plaintiff shall be entitled to have him called, and open the record, and pray for a reversal of the judgment.

RULE XII.

Upon the reversal of any judgment, order or decree of the Superior Courts, the party in whose favor the reversal is had, shall be entitled to collect in the court below all the costs which have accrued in the cause.

RULE XIII.

the Clerk of this court producing satisfactory evidence by affidavit the acknowledgment of the parties, their sureties or attorneys, of

having served a copy of the bill of costs due by them in this court, on such parties, sureties or attorneys, an attachment may issue against such parties, sureties, and attorneys, to compel payment of costs.

RULE XIV.

The counsel for the plaintiff in error shall furnish each of the Judges and the Reporter with a copy of the bill of exceptions and a note of the points or questions intended to be made, and a statement of the facts in the cause, which shall be submitted to each of the Judges and the Reporter, at or before the first day of the term to which the cause is returned, with a list of the authorities expected to be relied on. No agreement or admission between the parties, or their attorneys, shall be binding, unless the evidence thereof shall be in writing, subscribed by the party or his attorney, against whom the same shall be alleged.

RULE XV.

Only two counsel shall be permitted to argue for each party, plaintiff and defendant, in a cause; and the counsel for plaintiff in error shall begin and conclude, reading all the authorities upon which he expects to rely, in his opening argument; and in all special matters springing out of a cause at issue, or otherwise, the actor or party submitting a point to the court shall begin and conclude; and no cause shall be argued by brief alone.

RULE XVI.

The remittitur shall contain a copy of the judgment of the court annexed to the bill of exceptions, and a transcript of the record of the proceedings below as brought into this court under the seal of this court, and signed by the Clerk and the same shall be delivered to the party in whose favor the decision shall be made, on the payment of fees, by whom it shall, together with the bill of cost, be transmitted to the court below.

RULE XVII.

Whenever, pending a cause in this court, either party shall die, the proper representatives of such party may voluntarily come in and be admitted parties to the suit upon motion; and thereupon the cause shall be heard and determined as in other cases; and if, on or before the first term succeeding the decease of a party dying, there shall be no representation of his estate, or if represented, parties shall not be thus voluntarily made, then and in either of said events, the other party may at that term suggest the death on the record, and thereupon, on motion, obtain an order that unless such representation be had, and parties made thus voluntarily, as herein before authorized, on or before the second day of the term then next succeeding, the party moving such order, if defendant, shall be entitled to have the writ of error dismissed, and if the plaintiff, he shall be entitled to open the record, and proceed to a hearing: *provided*, that a copy of every such order shall be published in one of the gazettes at the Seat of Government, three successive weeks, at least sixty days before the said last-named term of the court, or served on the adverse party thirty days before the first day of said term.

RULES OF COURT.

RULE XVIII.

No cause shall be heard until a complete record shall be filed, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court; and all objections to the completeness of the record shall be made in writing, and verified by affidavit, on or before the third day of the term to which the cause is returned; and in all cases where such exceptions are filed, the cause shall be considered as returned to the next succeeding term, and the court shall on motion award a writ of Certiorari, directed to the court below, for the purpose of causing to be sent up the entire record, which writ shall be so served by the party or his attorney moving the same, and shall be returned to the next term after it is awarded: *provided*, that nothing herein contained shall prevent this court from awarding a process of contempt against any officer, in any case, where he may be considered as in default.

RULE XIX.

In all cases where a bill of exceptions has been certified and signed, a writ of error shall be made out by counsel for the plaintiff in error to this court, which shall be directed to the Judge of the Superior Court, so certifying and signing, together with a citation to the defendant in error to appear and answer.

RULE XX.

Such writs of error shall issue in the name of the Governor of the State, shall bear test in the name of the Judges of this court, shall be signed by the Clerk, and sealed with the seal of this court, and shall be returnable to the next succeeding term, and the citation shall bear test in the name of the judges of this court, shall be signed by the Clerk, and sealed with its seal.

RULE XXI.

The writs of error, with the citations thereto annexed, shall be filed with the Clerk of the Superior Court, at the time of tendering the bill of exceptions, copies of which made out by counsel of the plaintiff in error, shall be served on the defendant in error, or his counsel, by the sheriff of the county, or by counsel for plaintiff in error, within ten days from the signing and certifying of the bill of exception; and an entry of the same shall be made on the original writ by the counsel or sheriff who makes it officially; and it shall be the duty of the Clerk of court wherein such bill is signed and certified, to send up to this court, with the record of the cause, such original writ and citation, duly by them certified to be the originals filed in this office.

RULE XXII.

It shall be the duty of the Clerk of this court to keep on hand for the use of the bar, blank writs of error and citations, according to the form adopted by this court, duly by him signed and sealed, to be furnished to the bar, on application therefor.

RULES OF COURT.

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RULE XXIII.

The plaintiff in error shall, on or before the first day of the term to which the writ of error is returned, or immediately upon the filing of the record thereafter, file in the Clerk's office of this court an assignment of errors ; and the defendant in error shall, on or before the second day of that term, or within twenty-four hours after the assignment is filed, make out and file in office a traverse of such assignment ; and upon failure of plaintiff to file his assignment as herein required, the defendant shall, upon motion, be entitled to have the writ dismissed ; and should the defendant, as herein required, fail to file his traverse, then the plaintiff shall be entitled to proceed *ex parte* with his cause ; *provided*, that no error shall be assigned, except such as is expressed in the bill of exceptions.

RULE XXIV.

The following shall be the form of

WRITS OF ERROR :

THE GOVERNOR OF THE STATE OF GEORGIA,

To Judge of the Superior Courts
of Circuit, GREETING :

Because in the Records and Proceedings, as also in the rendition of a judgment in a cause in the Superior Court of county, before you, between and a manifest error is charged to have been committed to the damage of the said as by complaint and Bill of Exceptions by you signed and certified appears, and we being willing that the error complained of, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment in said cause as complained of be given, that then under your seal distinctly and openly you cause to be sent the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the State of Georgia, together with this writ, so that you have the same at on the day next in the said court, to be then and there held, that the records and proceedings aforesaid being inspected, the said court may cause further to be done therein to correct that error, what of right and according to law should be done.

WITNESS, The Honorable JOSEPH H. LUMPKIN, HIRAM WARNER and
EUGENIUS A. NISBET, judges of the Supreme Court of the State
{ L.S. } of Georgia, this day of 184 .

R. E. MARTIN, Clerk.

RULE XXV.

The following shall be the form of

WRITS OF CITATION :

STATE OF GEORGIA :

To GREETING :

You are hereby cited and admonished to be and appear at a Supreme Court to be held at the day of next pursuant to a Writ of Error filed in the Clerk's office of the Superior Court of the county of in said State, wherein is Plaintiff, and you are defendant in Error, to show cause, if any there be, why the judgment in said

error mentioned should not be corrected, and speedy justice should not be done to the parties in this behalf.

WITNESS, The Honorable JOSEPH H. LUMPKIN, HIRAM WARNER and
 { L.S. } EUGENIUS A. NISBET, Judges of the Supreme Court of the State
 of Georgia, this day of 184 .
 R. E. MARTIN, Clerk.

RULE XXVI.

All opinions delivered by the judges of this court shall, immediately upon delivery thereof, be handed to the Clerk, whose duty it shall be to record the same, and then to deliver the originals, with a transcript of the judgment or decree of the court thereon, to the Reporter.

RULE XXVII.

The papers belonging to the causes brought before this court shall be handed to the Clerk in person, or transmitted to him at Milledgeville.

RULE XXVIII.

It shall be the duty of the Clerk to note the time of filing assignments of error, and of traverses of such assignments, and no cause shall be considered as ready for a hearing until entry is made on the Docket of "Issue joined," which entry shall be made only in cases where Errors have been assigned and traversed, as provided in these rules.

RULE XXIX.

No argument or brief of counsel shall be received by the Reporter, after the opinion of the court has been delivered.

RULE XXX.

The counsel for the defendant in error, at or before the opening of the cause, shall submit to each of the Judges and the Reporter a statement of the points to be made, together with a list of the authorities intended to be relied on.

RULE XXXI.

After this year, no cause (except such as are provided for in the sixth section of the act creating this court) shall be considered as properly brought up, so as to authorize this court to hear and determine the same unless the Clerk shall certify and send a complete transcript of the entire record below, together with the Bill of Exceptions, within ten days after the filing of the original notice of the Bill of Exceptions, with the return of service thereon.

RULE XXXII.

All applications for writs of mandamus against defaulting officers, under the sixth section of act creating this court, shall be made at its first term, wherever holden, and on or before the third day of the term, after the alleged default occurs, unless prevented by providential cause; and the party seeking said writ against the Clerk, for failing or refusing to send up the whole record, and Bill of Exceptions, as required by
 on oath, that he applied personally, or by attorney, to said

officer, for said record and Bill of Exceptions, on or before the last day of the time allowed by law for certifying and sending up the same.

RULE XXXIII.

In all cases brought before this court, the Bill of Exceptions must distinctly specify the points of error in the judgment of the court below, upon which the plaintiff in error expects to rely upon the hearing, and that this rule take effect from and after the 1st of January next.

A SUMMARY,

Exhibiting the Terms of the Court held in 1846; the names of gentlemen admitted to practice therein, and their respective places of residence as far as known to the Reporter.

S U P R E M E C O U R T ,

TALBOTTON, (GA.,) JANUARY TERM, 1846.

Judges Present.—The Hon. HIRAM WARNER, and EUGENIUS A. NISBET. His Honor, Judge LUMPKIN, was not in attendance, owing to the indisposition of his family.

At this Term the following gentlemen, members of the bar of the Superior Courts, were admitted to practice in the Supreme Court :

Alfred Iverson,	Columbus, Georgia.
Hines Holt,	" "
James Johnson,	" "
Marcus Johnston,	" "
Adam G. Foster,	" "
Barnard Hill,	Talbotton.
Allen F. Owen,	" "
Edmund H. Worrell,	" "
William F. Brooks,	" "
A. G. Perryman,	" "
Levi B. Smith,	" "
S. D. Heard,	" "
Marion Bethune,	" "
J. L. Stephenson,	" "
Amos W. Hammond,	Culloden,

MACON, (GA.,) FEBRUARY TERM, 1846.

Present.—The Hon. JOSEPH HENRY LUMPKIN, HIRAM WARNER, and EUGENIUS A. NISBET, Judges.

The following gentlemen were admitted :

Edward D. Tracy,	Macon, Georgia,
Richard K. Hines,	" "
Thomas P. Stubbs,	" "
Jordan W. Lee,	Tarversville,
William W. Wiggins,	Marion,

SUMMARY.

Samuel T. Bailey,	Macon,	Georgia.
John Rutherford,	"	"
James A. Nisbet,	"	"
John J. Gresham,	"	"
Samuel R. Blake,	"	"
John B. Hines,	"	"
John H. Goodrich,	"	"
Howell Cobb,	Perry,	"
Frederick H. Sanford,	Milledgeville,	"
William S. Rockwell,	"	"
Henry G. Lamar,	Macon,	"
Samuel Hall,	Knoxville,	"
T. G. Holt,	Macon,	"
Winfrey L. Shockley,	"	"
Samuel D. Killen,	Perry,	"
Abner P. Powers,	Macon,	"
Oliver H. Prince,	"	"
Christopher B. Strong,	Perry,	"

CASSVILLE, (GA.) MARCH TERM, 1846.

Present.—Their Honors, LUMPKIN, WARNER and NISBET, Judges.

The following gentlemen were admitted:

John A. Jones,	Paulding county,	Georgia.
John W. Hooper,	Rome,	"
A. D. Shackelford,	Cassville,	"
William Y. Hansell,	Marietta,	"
James Milner,	Cassville,	"
Warren Akin,	"	"
D. R. Mitchell,	"	"
Julius M. Patten,	"	"
John J. Word,	"	"
Russel H. Cannon,	Gilmer county,	"
William H. Underwood,	Rome,	"
William T. Wofford,	—	"
Turner H. Trippe,	Rome,	"
Thomas A. Latham,	Campbellton,	"
William B. Terhune,	—	"
M. H. Garthright,	Dahlonega,	"
William Martin,	"	"
Robert Mitchell,	State of Alabama,	"

MILLEDGEVILLE, (GA.) MAY TERM, 1846.

Present.—Their Honors, LUMPKIN, WARNER and NISBET, Judges.

The following gentlemen were admitted:

William T. Gould,	Angusta,	Georgia.
Francis H. Cone,	Greensborough,	"
Augustus Reese,	Madison,	"
Augustus H. Kenan,	Milledgeville,	"
Robert V. Hardeman,	Clinton,	"
Samuel A. Wales,	Eatonton,	"
Iverson L. Harris,	Milledgeville,	"
Seaton G. Day,	"	"
John G. McHenry,	Greensborough,	"
James Thomas,	Sparta,	"
Robert W. Flournoy,	Sandersville,	"

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Herschell V. Johnson,	Milledgeville, Georgia.
Andrew J. Miller,	Augusta, "
Charles J. Jenkins,	" "
Junius A. Wingfield,	Eatonton, "
E. Starnes,	Augusta, "
Edward J. Black,	Jacksonborough, "
Thomas P. Saffold,	Madison, "
Carlton B. Cole,	Macon, "
Samuel Field,	Sandersville, "
William C. Dawson,	Greensborough, "
N. G. Foster,	Madison, "
James L. Brown,	Sparta, "
D. W. Lewis,	" "
Edward H. Pottle,	— " "
William Gibson,	Warrenton, "
Henry Sanford, ↑	Greensborough, "
M. H. McAllister,	Savannah, "
Robert Tolefree,	Eatonton, "
John M. Ashurst,	" "
A. E. Cochran,	Irwinton, "

HAWKINSVILLE, (GA.), JUNE TERM, 1846.

Present.—Their Honors, LUMPKIN, WARNER, and NISBET, Judges.

The following gentlemen were admitted :

William Law,	Savannah, Georgia.
Augustus H. Hansell,	Hawkinsville, "
Mulford Marsh,	Savannah, "
Peter E. Love,	Thomasville, "
David B. Robinson,	Hawkinsville, "
Theodocius B. Davis,	Savannah, "
Thomas E. Lloyd,	" "
Levi S. D'Lyon,	" "
Elijah E. Crocker,	Marion, "
William S. Whitfield,	Hawkinsville, "
James N. West,	Perry, "
Robert M. Charlton,	Savannah, "
Jared S. Dennard,	Perry, "
Charles S. Hawley,	Hawkinsville, "
George Brainard,	" "
Eli Warren,	Perry, "
P. J. Strozier,	Albany, "
Thomas B. Donelly;	Vienna, "

AMERICUS, (GA.), JULY TERM, 1846.

Present.—Their Honors, LUMPKIN, WARNER and NISBET, Judges.

The following gentlemen were admitted :

William H. Crawford,	Americus, Georgia.
A. MacDougald,	Columbus, "
E. R. Brown,	Americus, "
Benton Byrd,	Danville, "
Alexander W. Sneed,	Bainbridge, "
Alexander H. Cooper,	Columbus, "
Henry K. McCay,	Americus, "
William J. Patterson,	" "
Hugh McMoore,	—
William Taylor,	Cuthbert, "

Daniel W. Miller,	Lanier, Georgia.
Thomas C. Sullivan,	Americus, "
David Kiddoo,	Cuthbert, "
Grigsby E. Thomas,	Columbus, "
William B. Guerrey,	Americus, "
Isaac E. Bower,	Cuthbert, "
John P. Gaulden,	Bainbridge, "
Henry L. Benning,	Columbus, "
John B. Giles,	Lanier, "
Adam A. Robinson,	Americus, "
William H. Robinson,	Lanier, "
W. B. Martin,	—, "
A. H. Chappell,	Macon, "
John Campbell,	Tazewell, "
John Schley, Jr.,	Columbus, "
George M. Dudley,	Americus, "
Joseph Sturgis,	Columbus, "
Samuel Gainer,	Fort Gaines, "
John H. Jones,	" "
R. G. Carithers,	" "
Angus M. D. King,	Forsyth, "
Wm. K. DeGraffenreidt,	Blakely, "
B. F. Harrison,	Lumpkin, "
William C. Perkins,	Cuthbert, "
James M. Clark,	Albany, "
E. W. Warren,	Starkesville, "
Alexander A. Allen,	Bainbridge, "
Charles S. Gaulden,	Lumpkin, "
Richard F. Lyon,	Albany, "
William H. Campbell,	—, "
E. H. Platt,	Albany, "
John Bilbo,	" "
John A. Tucker,	Lumpkin, "
Augustus H. Gibson,	Americus, "
Bedford S. Worrell,	Lumpkin, "
Uriah G. Mitchell,	" "

DECATUR, (GA.) AUGUST TERM, 1846.

Present.—Their Honors, LUMPKIN, WARNER and NISBET, Judges.

The following gentlemen were admitted:

James M. Calhoun,	Decatur, Georgia.
George D. Rice,	Marietta, "
Charles J. McDonald,	" "
Leonard C. Simpson,	Decatur, "
Thomas F. Jones,	Covington, "
William Ezzard,	Decatur, "
William H. Dabney,	" "
Washington Poe,	Macon, "
John R. Alexander,	Lawrenceville, "
John Collier,	—, "
William W. Clarke,	Covington, "
Isham J. Wood,	—, "
James P. Simmons,	Lawrenceville, "
J. S. Pinckard,	Forsyth, "
Edward Cannon,	—, "
J. D. Alexander,	Greenville, "
Augustus C. Ferrell,	La Grange, "
Id I. Whittaker,	Fayetteville, "

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John Huie, ...	Fayetteville, Georgia.
Orville A. Bull, ...	La Grange, "
Obadiah Warner, ...	Greenville, "
Luther J. Glenn, ...	McDonough, "
P. B. Cox, ...	Griffin, "
L. T. Doyal, ...	Culloden, "
William W. Arnold, ...	Zebulon, "
William Dougherty, ...	Columbus, "
Charles Murphy, ...	Decatur, "

GAINESVILLE, (GA.) SEPTEMBER TERM, 1846.

Present.—Their Honors, LUMPKIN, WARNER and NISBET, Judges.

The following gentlemen were admitted:

Howell Cobb, ...	Athens, Georgia.
William L. Mitchell, ...	" "
J. W. H. Underwood, ...	Clarksville, "
C. Peeples, ...	—, "
Junius Hillyer, ...	Athens, "
Thomas R. R. Cobb, ...	" "
B. R. Daniell, ...	—, "
John Gray, ...	—, "
B. Elliot Habersham, ...	Clarksville, "
John R. Stanford, ...	" "
William H. Hull, ...	Athens, "
Nathan L. Hutchins, ...	Lawrenceville, "
A. M. Russell, ...	Dahlonega, "
W. J. Peeples, ...	—, "
A. K. Blackwell, ...	—, "
Green B. Haygood, ...	Watkinsville, "
B. H. Overby, ...	Jefferson, "
H. Lightfoot Sims, ...	Cross Plains, "

MILLEDGEVILLE, (GA.) NOVEMBER TERM, 1846.

Present.—Their Honors, LUMPKIN, WARNER and NISBET Judges.

The following gentlemen were admitted:

Pulaski S. Holt, ...	Eatonton, Georgia.
R. B. Lester, ...	Macon, "
J. J. R. Flournoy, ...	Augusta, "
C. O. McConnell, ...	Sandersville, "
R. Toombs, ...	Washington, "
Alexander H. Stevens, ...	Crawfordville, "
James Gardner, Jun., ...	Augusta, "
William McKinley, ...	Lexington, "
B. F. Hardeman, ...	" "
Eli H. Baxter, ...	Sparta, "
S. A. Baily, ...	Columbus, "
Seaborn Jones, ...	" "
Stephen Upson, ...	Lexington, "
Solomon Cohen, ...	Savannah, "
John E. Ward, ...	" "

NOTE.—The cases adjudicated at each of the foregoing Terms, are reported in the body of the work. No case was left undisposed of.

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The following is appended, being a correction of cases cited in some instances by the court, and in others by the counsel. The page at the left hand indicates where they may be found.

Page

5	Read Jackson ex dem. Merritt and Stanton vs. Gumaer, 2 Cowen, 552.
20	" Maigley vs. Hauer, 7 Johns. Rep., 341.
35	" Rex vs. Loxdale et al. 1 Burrow, 447. In the same line, <i>where</i> for <i>when</i> .
42	" Willings and Francis et al. vs. Consequa, Pet. C. C. Rep., 321.
80	" Barker vs. Talcott and Shaw, 1 Vernon, 473.
111	" Smith vs. Adm. Cheney, 1 Hill Rep., 143.
118	" Bowyer vs. Bampton, 2 Strange, 1155.
125	" Griffith vs. Reford, 1 Rawle, 197.
148	" Allen vs. Imlett and Nichols, 1 Holt, 641.
156	" Mason vs. Waite, 17 Mass. Rep., 560.
168	" Denn vs. Dolman, 5 D. and E., 651. Also, Thayer vs. Rock, 13 Wend. 53.
171	" Crespigny vs. Wittenoom, 4 Term Rep., 793.
219	" Pain vs. Keeston, 1 Moo. and Rob., 20.
226	" Ewer vs. Jones, 6 Mod., 26. Also, Dover vs. Maestaer, 5 Esp. R. 92.
228	" Calder et eux, vs. Bull, 3 Dall. Rep. 336.
232	" Kaughley vs. Brewer, 16 Sergeant and Rawle, 133-4; Lynch vs. McHugo, 1 Bay, 23. Prince vs. Smith, 4 Mass., 455.
242	" Matthews vs. Wallwyn, 4 Ves. 118.
258	" Butler vs. Warner, 11 Johns. Rep., 57.
290	" Scott vs. Elmendorf, 12 Johns. Rep., 319.
298	" Tomlinson vs. Gill, Ambler, 330.
307	" Shed vs. Brett, 1 Pick. Rep., 401.
311	" Grugion vs. John Smith, 6 Adolphus and Ellis, 501.
314	" Brigham vs. Marean, 7 Pick. Rep., 40.
325	" 4 Munford, 196 Monroe vs. James. Also, Bonny vs. Ridgard.
342	" Thompson vs. Tolmie, 2 Pet. Rep., 157.
353	" Beeston vs. Collier, 4 Bing., 309.
370	" Dawes et al. vs. Shed et al. 15 Mass. Rep., 7.
330	" Carey vs. Stephenson, 2 Salk., 421.
391	" Reynolds vs. Shuler, 5 Cowen Rep., 323.
391	" Hutchinson vs. Bobo, 1 Bailey's Rep., 546.
399	" Lynch vs. Dunsford, 14 East. R., 494.
421	" Episcopal Charitable Society vs. Episcopal Church in Dedham, 1 Pick. R., 372.
422	" Townsend vs. Corning, 23 Wend., 440.
422	" Chirac vs. Reinicker, 12 Wheat., 280.
	" Ogua and Hewett, vs. Carroll and Martin, 1 Ala. R., (by minor,) 123, &c.
	" ray vs. De Rottenham, 6 John. Ch. R., 52.
	" vs. Caruth, 1 McCord's Rep., 507.
	" x'or, vs. McCulloch, Cam. and Nor., 492.

REPORTS OF CASES

ADJUDICATED IN THE

SUPREME COURT OF GEORGIA.

MARCH TERM, 1846.

No. 1.—DOE ex dem. TAULUCK et al. *vs.* PEEPLES et al.

Motion to Dismiss Writ of Error.

THE Bill of Exceptions must be drawn up by the party, or his Attorney, within four days after the trial in which the decision complained of has been made; and must be certified, and signed by the presiding judge, within that time.

The certificate of the judge below, in this case, being without date, the court will presume in favor of public officers, in the absence of all proof to the contrary, that they discharge their duty in compliance with the law.

The errors complained of should be plainly and distinctly specified in the bill of exceptions.

The giving of bond and security, upon the carrying up of cases to the Supreme Court, is *optional*, not *compulsory*.

The bill of exceptions will operate as a supersedeas only where bond and security has been given, or affidavit filed, in conformity with the Act organizing the Supreme Court.

Where no bond has been given, or affidavit filed, the opposite party is at liberty to proceed to enforce his rights, in the court below, by execution, or otherwise.

This cause was called up in its order, when AKIN, of counsel for defendants in error, moved to dismiss the writ, on the following grounds:

1. Because it did not appear from the record before the court, that the bill of exceptions was made out, and certified by the presiding judge, within four days after the trial, as required by the Act organizing the Supreme Court.

2. That the bill of exceptions did not show the grounds upon which the decision below was made.

3. That the bill of exceptions was too general and uncertain.

4. That the original bill of exceptions had not been returned into this court by the clerk of the court below, as required by said act.

5. That no bill of exceptions had been filed.

6. That it did not appear that bond and security had been given, or affidavit filed, as said act required; nor that the plaintiffs in error resided out of the county in which the decision complained of was made.

The bill of exceptions, and certificate of the judge of the court below—

were without date ; though the transcript of the record sent up showed that the trial was had on the 10th of February, 1846, and that the notice of the filing of the bill of exceptions was given on the 13th day of the same month.

The ground of error set forth in the bill of exceptions was, that the court below rejected the deed which was offered in evidence, on the ground that its execution *was not sufficiently proven*, and thereupon awarded a nonsuit, without specifying any particular defect in the proof, or showing wherein the same was deemed insufficient. The rejected deed was executed on the 9th of January, 1833, and recorded on the 21st of June, 1839. It purported to have been executed in the presence of two attesting witnesses, and acknowledged before a Justice of the Peace ; but there was neither date nor place to the acknowledgment.

The paper produced as the original bill of exceptions did not set forth a copy of the deed, but referred to it, together with the proceedings in the court below ;—and a copy of the deed “ in words and figures ” was embodied in the transcript of the record from the court below.

The record was silent as to whether any bond had been given, or affidavit made ; and also, as to the residents of the plaintiffs, in error.

This motion was argued by AKIN for defendants in error,—and by HANSELL, UNDERWOOD and JONES for the plaintiffs.

By the Court—LUMPKIN, Judge.

As to the first ground the act creating this tribunal is explicit, that the bill of exceptions must be drawn up by the party or his attorney, within four days after the trial, in which the decision complained of has been made ; and certified and signed by the presiding Judge within that time. The difficulty here is, that the certificate has no date : But must not this court, in favor of Public Officers, presume that they discharge their duty, in compliance with the law, in the absence of all proof to the contrary ? Moreover, it is in proof that notice, that the Bill of Exceptions had been certified and signed by the Judge, was served upon the adverse party on the third day after the trial. It is apparent, therefore, that this act was performed within the *four days*. *Id certum est quod certum reddi potest.*

The second and third grounds may be considered together. The 4th section of the statute prescribes that the party bringing up the cause shall specify in the bill of exceptions the errors complained of.

It is very important for the correct administration of the law, as well as for his own justification, that the Circuit Judge in the language of the Legislature should see to it, that the bill of exceptions “ *be true and consistent with what has transpired in the cause before him,* ” for upon this paper, and the transcript of the record *alone*, all matters in this court must be heard and determined. The omission of a single fact, or the insertion of one which did not exist, may, and likely will, defeat the ends of justice. The court are constrained to admit that the errors complained of, are not set forth with that distinctness which is desirable ; still they do not deem the defect in this instance so palpable as to force the court to dismiss the writ. A copy “ in words and figures ” of the rejected deed is set out in the record, and the Judge certifies that it is a true narrative of what transpired before him, in the trial below. We infer, therefore, that
 was no evidence produced as to the execution of the deed except
 orsement of registration by the clerk upon the attestation of two

To prevent misapprehensions the court would observe, that the bill requires, that a "complete transcript of the entire record of the cause below," and also the bill of exceptions, be sent up to this court.

We meet it by saying that none is required.

In all cases where Bond is given, or an affidavit filed as provided for by the law, it operates as a *supersedeas*.

The failure or neglect to do this will not prevent this court from hearing and determining the causes, which may be sent up from the courts below.

No. 2.—JOHN DOE ex dem. JAMES H. TRULUCK and SUTTON H. TRULUCK and REUBEN HERNDON, plaintiffs in error, vs. RICHARD ROE, casual ejector, and JOHN PEEPLES, tenant in possession, and JAMES SIMMONS, and others, co-defendants, and defendants in error.

A Deed to land, signed, sealed and attested as follows :

Acknowledged in the presence of me, WILEY PEARCE, J. P., and recorded in the Clerk's office of the Superior Court in the county where the land lies, is admissible in evidence without further proof.

It is presumed, until the contrary is proved, that every man obeys the mandates of the law, and performs all his *official* and social duties.

This was an action of Ejectment, tried in the Superior Court of the county of Cass, before Judge Wright. The transcript of the record discloses that this action was predicated upon two several demises: the first

from James H. and Sutton H. Truluck, jointly; and the second from Reuben Herndon, for the recovery of lot of land known as number one hundred and six, in the twenty-third district of the second section of, originally, Cherokee, now Cass county, aforesaid. At the February term, 1846, of said Superior Court, the said action came on to be heard; and on behalf of plaintiff, a grant of said lot of land from the State of Georgia to James Matthews was offered, and read in evidence to the jury.

The counsel for the plaintiff then tendered a deed from James Matthews, conveying said lot of land to the lessors, James H. and Sutton H. Truluck, jointly, which deed is in the words and figures following:

GEORGIA, } This Indenture, made the twenty-ninth of January,
Deatur County. } A. D., 1833, between James Matthews, of the county
and State aforesaid, of the one part, and James H. Truluck and Sutton H. Truluck, of the same place, of the other part: Witnesseth, that the said James Matthews, for and in consideration of the sum of one hundred dollars, to him in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, convey and confirm unto said James H. and Sutton H. Truluck, their heirs and assigns, all that tract or parcel of land situate, lying and being in Cherokee county, known and distinguished by lot number one hundred and six, in the twenty-third district, second section, of said county, containing one hundred and sixty acres, more or less: to have and to hold said tract of land, with all and singular the rights, members and appurtenances thereof whatsoever, to the said James H. and Sutton H. Truluck, being, belonging, or in anywise appertaining, with the remainder and remainders, reversion and reversions, rents, issues and profits thereof to the only proper use, benefit and behoof of them, the said James H. and Sutton H. Truluck, their heirs, executors, administrators and assigns, in fee simple. And the said James Matthews, his heirs, executors and administrators, and all and every person or persons, shall and will warrant, and forever defend, by virtue of these presents. In witness whereof the said James Matthews hath hereunto set his hand and affixed his seal, the day and year first above written.

Signed, sealed and delivered in presence of his
WRIGHT SANDERS, JAMES X MATTHEWS, [Seal.]
THOMAS SANDERS. mark.

Acknowledged in the presence of me, WILEY PEARCE, J. P.

GEORGIA, Cass County; }
Office of the Clerk of the Superior Court. }

Recorded in book D. of Deeds, page 291. June 21st, 1839.

CHESTER HAWKES, Clerk.

Which was objected to by defendants' counsel, on the ground that the signing, and delivery thereof, was not sufficiently proven, to authorize the same to be read in evidence to the jury; which objection was sustained by the court below, the deed rejected, and the plaintiff thereupon non-suited.

To all which the plaintiff in error excepted.

WM. H. UNDERWOOD, JOHN A. JONES and WM. Y. HANSELL, counsel

Doe ex dem. Traluck et al. vs. Peoples et al.

for plaintiff in error, relied upon the Registry Acts of this State; *Prin. Dig.* 162, 166, 167; and *Hotchkiss Stat. Laws of Georgia*, 418.

T. H. TRIPPE, W. AKIN and D. R. MITCHELL, counsel for defendants in error, cited *Jackson ex dem. Wycoff vs. Humphrey*, 1 *Johns. Rep.* 498; *Jackson ex dem. Parker and others vs. Philips*, 9 *Cowen*, 94; *Dibble vs. D. and B. P. Rogers*, 13 *Wend.* 536; *Jackson ex dem. Merritt and Staunton vs. Germain*, 2 *Cowen*, 552.

By the court—WARNER, Judge.

The error assigned in this case is the rejection of the Deed mentioned in the Record, and awarding a nonsuit in the court below. The only question for the decision of this court is, whether the deed was properly executed, according to the provisions of the several Acts of the Legislature of the State of Georgia, to have admitted the same in evidence.

By the Act of 22d February, 1785, (*Prince's Dig.* 162,) it is enacted, "That all deeds of conveyances by way of bargain and sale, *bona fide*, of lands or tenements, and executed under hand and seal, in the presence of two or more witnesses, and a valuable consideration paid, that are proved or *acknowledged before a Justice of the Peace*, or before the Chief Justice, or one of the Associate Justices, and the said deed is registered by the clerk of the court in the county where such lands or tenements lie, in a book by him to be kept for that purpose, within twelve months from the date thereof, such deed of conveyance is declared to be good," &c.

By the 3d section of the Act of 26th December, 1827, (*Prince's Dig.* 166,) it is enacted, "Every deed of conveyance or mortgage of either real or personal property hereafter to be made, may, upon being executed in the presence of, and attested by a notary public, Judge of the Superior Court, Justice of the Inferior Court, or Justice of the Peace, and in cases of real property by one other witness, be admitted to record, and made evidence in the different courts of law and equity in this State," &c. The deed offered in evidence in the court below, is attested by two witnesses, and acknowledged in the presence of a Justice of the Peace, and recorded in the county of Cass, 21st June, 1839. The objection urged by the defendants in error was; it did not appear on the face of the deed, *when* and *where* the acknowledgment before the Justice of the Peace was made. The deed on its face purports to have been made in Decatur county, in this State, on the 29th January, 1833. And this court will presume the acknowledgment was made in the county where the deed purports to have been made; and at the time it purports to bear date, in the absence of all proof to the contrary.

We shall not voluntarily impute *malpractice* to the officer before whom the acknowledgment was made, by presuming it was taken at a time, and place, when, and where, he had no authority to take it.

It is presumed, till the contrary is proved, that every man obeys the mandates of the law, and performs all his official and social duties.—*Greenleaf's Evidence*, 47; *The Bank U. S. vs. Dandridge*, 12 *Wheaton's Rep.* 64; *Hartwell vs. Root*, 19 *John's Rep.* 345.

We are therefore all of the opinion, the deed ought to have been admitted in evidence, and that the court below committed error in rejecting the same and awarding a nonsuit. Let the nonsuit be set aside and the case reinstated.

No. 3.—MOORE vs. FERRELL et al.

Motion to dismiss Writ.

A motion was made to dismiss the writ of error on the ground that the order of the Judge below, dissolving the injunction, was made at Chambers. And that the Supreme Court possesses no jurisdiction over decisions made by Judges of the Superior Courts in vacation.

AKIN for the motion.

UNDERWOOD and TRIPPE contra.

By the Court—LUMPKIN, Judge.

The 25th section of the Act of 1811 provides that, "All bills of injunction granted by the Superior Courts, or any of them, or which may hereafter be granted, shall stand and be considered as open for argument and amendment at the *first Term* of the Superior Court which may be holden after the passing of this act, in and for the county where the suit originated; or the *first Term* after the granting of such Bill of Injunction," &c. This court will not decide, because it is not necessary, how far the Rule in Equity, authorizing applications to dissolve injunctions to be made *before the first Term* of the court to which the same is returnable, is warranted by the statute just quoted. Were the alternative presented of rescinding this Rule of Practice, promotive as it may be of public justice, or retaining jurisdiction of decisions made out of Term time we should not hesitate: We find ourselves, however, in no such dilemma. The 4th section of the Act creating this tribunal provides that "all causes of a criminal or civil nature may, for alleged error in any *decision, sentence, judgment or decree*, of any such Superior Court, be carried up from the counties in the respective districts aforesaid to the Judges of the Supreme Court, at the respective terms thereof for such district, to be by the said Supreme Court revised and determined." The only inquiry then is, was the order of the judge below, dissolving the injunction, a "*decision, sentence, judgment or decree*" of the Superior Court? If so, the right of this court to revise and determine it is clearly given.

It is true that in another part of the same section the law provides that the costs shall be paid, and the bond given within four days after the *Term* at which the exceptions were taken. A different phraseology obtains, however, in the previous part of the section specifying the mode in which causes are to be carried up, namely: that it is to be done within four days after the *trial* of the cause in which the decision or sentence has been made. Were it otherwise, we should still hold that the session of the court below, although intermediate the *regular Terms*, was nevertheless a *Term* quoad the judgment, or decree complained of.

Motion overruled.

No. 4.—MICHAEL C. MOORE, plaintiff in error vs. VINCENT FERRELL et al. defendants in error.

Injunction.

Service of the Rule Nisi upon the complainant's Solicitor stating the grounds of the application, and fixing the time and place of hearing the motion to dissolve an Injunction in vacation, on the coming in of the answer, is sufficient service.

Where the answer plainly and distinctly denies the facts and circumstances upon which the Equity of the bill is based, the Injunction will be dissolved.

Upon a motion to dissolve an Injunction, the court will look to such parts of the answer only, as are responsive to the Bill.

A defendant in Equity cannot both charge and discharge himself by his answer.

In cases where Equity interferes to execute preventive justice, by enjoining trespasses, she still forbears to intermeddle with the title.

Trespass will be enjoined, in all cases, where from the nature of the trespass, or the circumstances of the parties, the remedy at law cannot be full and adequate.

All persons are entitled to be protected in the use, integrity, and value of their property; and where courts of law cannot give such protection; whether because of the tardiness of the remedy—the peculiar nature of the property injured—the insolvency of the wrong-doer, or the plaintiff's inability to prove his damage—Equity must needs interfere, in order that justice be done, with her harsh, but indispensable process of Injunction. An Injunction will not be dissolved upon the ground that the title of the complainant is questioned by the answer. But where the title is denied, the courts will look more closely to the character of the trespass.

For the facts of this case, see the opinion of the court.

UNDERWOOD & TRIPPE, for the plaintiff in error, cited *4th Rule in Equity Practice, established by the Judges of the Superior Courts of this State in Convention*, in support of the second ground of error. In support of the 3d ground 3 *Ves.* 140; 6 *ib.* 707, 147; 17 *Ves.* 110; 7 *Ves.* 559; 2 *Johns. C. Rep.* 122; 17 *Ves.* 128-281; 15 *Ves.* 138; 2 *Johns. Rep.* 473; 1 *Johns. Rep.* 12; 7 *Johns. Rep.* 320-330; 6 *Johns. Rep.* 497; 2 *Johns. Rep.* 202.

AKIN, for defendants, cited *Pillsworth vs. Hopton*, 6 *Ves.* 51; *Hanson vs. Gardner*, 7 *Ves.* 304; *Smith vs. Collier*, 8 *Ves.* 89; *Courthope vs. Maplesden*, 10 *Ves.* 290; *Norway vs. Rowe*, 19 *Ves.* 146; *Stonn vs. Mann*, 4 *Johns. C. Rep.* 21; *Eden on Injunctions* 233-5; 2 *Story's Com. on eq.* 209.

By the Court—NISBET, Judge.

This cause came before this court, upon a transcript of the record, from the county of Gilmer. The plaintiff in error, Michael C. Moore, filed his bill in the court below, alleging that, as a fortunate drawer in the land lottery, he is the rightful owner of a lot of land situate in the county of Gilmer—that there is on it a rich, and therefore valuable, gold mine—that the defendants, Ferrell and others, being in possession, are engaged in digging gold from the mine, and are daily carrying away large quantities of gold—that they are either insolvent, or so poor as to be unable to respond in damages—that it is impossible to prove the amount of injury which they are likely to do to the complainant, without resort to their consciences, and that the trespass of the defendants will result in irreparable injury to him, unless they are restrained. The bill concludes with a prayer for Injunction—that the title papers of the defendants be delivered up to be canceled, and for relief generally.

The bill was sanctioned and the Injunction ordered. Before the appearance Term of the bill, the defendants filed their answer and moved the court at Chambers for a rule upon the complainant to show cause why the injunction should not be dissolved. The rule being granted, service thereof was perfected, upon the complainant's solicitor

swer admits that the complainant was the drawer of a lot of land under the lottery acts of the State of Georgia, and that the State's grant had duly issued to him; but states that since the issuing of the grant, the land has been sold as the property of the complainant, by the Sheriff of Gilmer county—by virtue of an Execution against the complainant, issued from a Magistrate's Court—and that they claim title under the purchaser at the Sheriff's sale.

The defendants, in their answer, further state that the complainant has parted with all the title which he ever had to the land by deed to one Samuel Tate. They admit that they are in possession and engaged with a large force in digging gold—that the mine on the land is valuable, and that they receive from it daily a considerable amount of gold. Their insolvency they neither admit nor wholly deny. Such are the facts embraced in the bill and answer, which the court think necessary to be stated, in order to a clear understanding of the principles of law, which they believe govern this cause.

The Judge of the Circuit Court having heard argument at Chambers, upon the rule, dissolved the injunction. To this decision the complainant excepted, and assigned for error:

1st. That the Injunction was dissolved before the term of the court to which the bill was returnable, contrary to the Statute of Georgia.

2d. That the rule to show cause was not legally served—it being served on the complainant's solicitor, when it should have been served on the complainant himself.

3d. That the bill being filed to restrain a trespass upon a gold mine, and the matter set forth therein, showing a case of irreparable injury to the complainant, and of utter destruction to the mine, a Court of Chancery will enjoin the trespass, until the title to the land can be settled by judgment of a court of law.

Two other assignments of error were made, but are considered only as different forms of the third assignment. Issue being joined, the cause was ably argued upon the second and third assignments, the first being abandoned by the counsel for the plaintiff in error.

In the 4th of our rules in equity, it is provided that in cases of injunction, the respondent shall be entitled to file his answer at any time after the filing of the bill; and thereupon, at Chambers, moving the judge who granted the bill for the dissolution of the injunction: if the equity of the bill shall be sworn off by the answer. But in such cases a rule nisi, stating the grounds of the application, and fixing the time and place of hearing the motion, shall be served on the *complainant*, at least ten days before the hearing of any such motion. The service of the rule nisi in this case was made on the complainant's solicitor, instead of the complainant, and for this reason, it is contended, under the requirements of the rule recited above, that the court erred, in not dismissing the rule nisi, and holding up the injunction. This court does not so think. It is true that the 4th rule does require the service of the rule nisi to be on the complainant. The advantages of this requirement are more than counterbalanced by its inconveniences.

In most cases it would be more convenient, and therefore desirable, to complainant himself, that the service should be upon his solicitor. intended, no doubt, as a boon, but it looks more like a burthen to plainant. Why it is so, need not be here argued. Still if this

was the only rule upon the subject of service of notices, the court would be constrained to reverse the decision of the Circuit Judge. By the 16th of our rules in equity, it is provided as follows: "After appearance by the party defendant, to any bill in equity, by any solicitor of this court, the service of any subpoena to make better answer, or any rule or order of the court, on such defendant or solicitor shall be sufficient—service on complainant or his solicitor, shall in like manner be deemed sufficient service." The defendant having in this case, filed his answer by his solicitor, the court holds that to be such an appearance by counsel, as will bring the service of the rule nisi under the provisions of the 16th rule, and make it sufficient.

Waiving for a moment the main inquiry, and conceding that a Court of Chancery, can enjoin a trespass, aside from any other consideration, was the equity of this bill so denied, or sworn off by the answer as to entitle the defendants to a dissolution of the injunction? The court are of opinion that it was not. It is a well settled rule in equity, that upon the coming in of an answer plainly and distinctly denying the facts and circumstances upon which the equity of the bill is based, the court will dissolve the injunction; it is also settled that for the purposes of the dissolution, all such parts of the answer as are responsive to the bill are to be taken as true. What are the facts upon which the equity of this bill rests? The title of the complainant to the land—its great value in consequence of the golden ore imbedded in it—the insolvency, or inability to respond in damages of the defendants, and the consequent irreparable injury they were doing to him, by digging his gold. It is because of these facts, thus stated, that the injunction was at first granted, and if not denied, they constitute still the strongest equity. Now so far from the answer denying them, they are all therein admitted, except the insolvency of the defendants, which it very unsatisfactorily denies. The answer admits that complainant drew the land, and that the State's grant was duly issued to him—that there is within it a rich mine which they (the defendants) are engaged in working, and that they abstract therefrom daily about one hundred pennyweights of gold. The irreparable character of the injury is a necessary legal inference from the facts admitted. So that, in the statements of the answer responsive to the bill, the court can find no sufficient denial of the complainant's equity. It is true that the answer states that complainant's title to the land passed from him to them, by levy and sale under a judgment against him; and that in addition, he had parted with his title, by deed to a third person. Upon a motion to dissolve, the court cannot take these statements as true—they are not responsive to the bill, and are matter in avoidance, which the defendants would be compelled to prove on the trial.

A defendant in equity cannot both charge and discharge himself in his answer. The court therefore believe, that upon the concession of the right of equitable interference in this case, there is not such a denial of the equity of the bill, as can justify the dissolution of the injunction.—*4 Johnson's C. Rep.* 499; *2 Johnson's C. Rep.* 88; *7 Vesey*, 587.

Upon the question, as to the power of a Court of Chancery, to restrain a trespass, in the case made by this bill and answer this court entertains no doubt whatever.

Ordinarily all remedy for a trespass is at law, because ordinarily that remedy is quite sufficient. And to the courts of law appertains the ju-

jurisdiction over titles to land. In all cases of ordinary trespass, equity will leave the party to his redress at law. And in cases where she interferes to execute preventive justice by enjoining trespassers, she still forbears to intermeddle with the title.

The remedy which courts of law afford for trespasses is retributive—it is indispensable to any adequate protection of the rights of the citizen, that there should exist somewhere a preventive power. This necessary power is wisely lodged with our courts of chancery, to be exercised with enlightened discretion, by process of injunction. Any system of laws which affords no such power, must be exceedingly defective. It is truly said by a learned English chancellor, that the want of it would be a reproach to the “moral jurisdiction” of courts of chancery. The jurisdiction here claimed for a court of equity, has been exercised in England since the time of Lord Thurlow; for the first case of injunction for trespass, so far as we are informed, was that of *Flammang* (cited in 6 *Vesey*, 147) under his administration. The jurisdiction was conceded by Lord Eldon in subsequent cases, and has been acknowledged in this country by repeated adjudications before the highest tribunals. Formerly it was exercised only to restrain waste between parties holding privity of title; now it is extended to all cases of trespass attended with irreparable mischief; or which result in the destruction of the substance of the property; or to cases where a plaintiff at law cannot prove his damage. Indeed trespass, will now be enjoined in all cases where, from the nature of the trespass, or the circumstances of the parties, the remedy at law cannot be full and adequate. Such as the working of mines, (6 *Vesey*, 147; 7 *Vesey*, 307.)—Destruction of timber, (10 *Vesey*, 290; 2 *Hill's C. R.* 617.)—The digging and amotion of stones of peculiar value, (17 *Vesey*, 128.)—Quarrying common stone, (18 *Vesey*, 184.)

The reasoning upon which all these cases are decided is very much the same. It starts with the assumption that all persons are entitled to be protected in the use, integrity, and value of their property; and where courts of law cannot give such protection; whether because of the tardiness of the remedy; the peculiar nature of the property injured; the insolvency of the wrong-doer, or the plaintiff's inability to prove his damage,—equity must needs interfere, in order that justice be done, with her harsh, but indispensable process of injunction. In the cases referred to the main inquiry was this, “Is the injury complained of likely to be irreparable?” and when charged so to be in the bill, and obviously, from the facts stated, truly charged, the injunction has not been withheld. The application of this test to the case now under consideration, will, it is believed, at once dispel all doubt as to the error of the circuit judge in dissolving this injunction. This question came under the review of Chancellor Kent, in the last case which he tried before descending, at the bidding of the law, from the Bench,—it is reported in 7 *Johnson's C. Rep.* 332, and the question is discussed with the great Chancellor's usual learning and ability. See also 1 *Swanst.* 207; 15 *Vesey*, 138; 6 *Johnson's C. Rep.* 497; 1 *Johnson's C. Rep.* 318; *Eden on Injunctions*, 229; 1 *Page*, 97.

It is however contended by counsel for the defendant in error, that by giving to a court of chancery the right to enjoin trespasses, in cases of irreparable injury, yet the interference of that court is limited to cases where the title of the complainant is not questioned by the answer, and that as this answer sets up title in the defendants, the injunction was

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rightfully dissolved. Where injunctions have been granted to stay *waste*, as before stated, the cases have been founded on privity of title; and in such cases no question as to title could be made. The distinction, so far as the jurisdiction of chancery is concerned, between waste and trespass, has been broken down. Now injunctions will be granted against waste and trespass, (6 *Johns. C. Rep.* 497,) but against trespass in the cases before designated, and in all such cases, whether the title be brought in issue or not. It seems, however, that where the complainant's title is denied, the courts will look more closely to the character of the trespass. In several of the cases relied upon by counsel for plaintiff in error, as shown by the comments of counsel for the defendants, there was no issue made about title. In other cases the title of the complainant was denied; or the defendants justified under an adverse title, or a legislative, or prescriptive right. In the case of 7 *Johns. C. Rep.*, the defendants who were charged with trespassing on the land of the complainant, in digging stone and other material to construct a dam on the Hudson, sought to justify by claiming, in their answer, that they were acting on behalf of the State, and by authority of its statute laws. The case in *Hill's C. Rep.*, in its facts and doctrines, strikingly sustains the position taken by this court. In that case the bill was filed to stay trespass in cutting down and removing timbers from the complainant's land, near to Columbia, and charged to be valuable only for the firewood that was on it.

The defendant in his answer admits the alleged trespass, but insists that he has a perfect legal and equitable title to the premises. Here both parties claim the title. The Chancellor granted the injunction, and upon appeal his decision was affirmed. In other cases, particular reference to which is not necessary, a similar state of facts is presented. Mr. Justice Story, in commenting upon this head of equity jurisdiction, says: "The interference of Courts of Equity in restraint of waste, was originally confined to cases founded in privity of title—but at present the courts have, by insensible degrees, enlarged the jurisdiction to reach cases of *adverse claims and rights, not founded in privity*, as for instance, to cases of trespass attended with irreparable mischief," (2 Story's Com. on Equity, 200.) The point made by the defendant's counsel, is met by this renowned commentator and in terms denied.

The reasons for giving to Courts of Equity, in our own State, this salutary jurisdiction, are conclusive; and apply with equal force nowhere but in countries where mines of the precious metals abound. They are found in the number and value of our gold mines—the facility with which, in a very short space of time, incurable injury may be done to the property—the impossibility, in almost every case, of demonstrating by proof at law the extent of the damage—and in those temptations which gold alone can offer to the cupidity of the lawless. It is no answer to say that an injunction may work ruin to an honest owner. The withholding it will more frequently work ruin to honest owners. Besides, the defendant is protected by the injunction bond.

Upon reason and authority, therefore, this court determines, that the jurisdiction in courts of Equity, to restrain trespass in all cases like the present, is fully established, and the order of the circuit judge dissolving the injunction must be reversed.

No. 5.—JOB ROGERS, plaintiff in error, vs. ROBERT ATKINSON, administrator, and MENEMIAH LIGON, administratrix, of Marshall Ligon, deceased, WILLIAM SOLOMON, JAMES M. SPULLOCK, executor, and MALINDA HARGROVE executrix, of ZACHARIAH B. HARGROVE, deceased, defendants in error.

In Equity.

Parol evidence is inadmissible to contradict or vary the terms of a written agreement. Where the contract is reduced to writing, conversations or stipulations anterior to, or contemporaneous with, the written instrument, are supposed to be merged in it, and are not allowed to be proved by oral testimony.

If it were not necessary in the first instance, to have the contract reduced into writing, parol evidence may be received of conversations and circumstances, *subsequent* to the time of making the agreement, to show that the parties upon sufficient consideration consented afterwards to vary the contract or add some new stipulation.

It matters not how soon after the execution of the written contract, the parol one was made. If it was in fact *subsequent*, and is otherwise unobjectionable, it may be proved and enforced.

Equity relieves against mistakes as well as frauds in a deed or contract in writing, and this either where the plaintiff seeks relief affirmatively on the ground of mistake, or where the defendant sets it up as a defence, or to rebut an equity.

Where an instrument is drawn and executed for the purpose of carrying into effect a contract written or parol, previously entered into, and which by mistake of the draftsman, in fact or in law, does not fulfill the intention of the parties, equity will correct the mistake so as to produce a conformity of the instrument to the agreement.

An injunction will not be granted to stay a sale under an execution, on the ground that the judgment has been fully satisfied, inasmuch as the party has a prompt and adequate remedy at law. It is otherwise when the bill charges, that the payment has been made by the representatives of the principal defendant, or a third person, under a fraudulent combination to oppress the complainant, and that the facts attending the transaction rest in the knowledge of the defendants alone, and can only be obtained by an appeal to their consciences,

This cause was brought before the Supreme Court at Cassville, March term, 1846, upon the transcript of the record, bill of exceptions and writ of error thereon from the Superior Court of Floyd county. Its history is this. Marshall Ligon, the intestate of Robert Atkinson and Menemiah Ligon, commenced suit in his lifetime against Job Rogers, the plaintiff in error, and Zachariah B. Hargrove, then also in life, the testator of James M. Spullock and Malinda Hargrove, to recover damages for a negro boy, wagon, team and harness, alleged to have been lost by the sinking of the ferry boat at Rome, which boat was charged to have been the joint property of Rogers and Hargrove; but which in fact, at the time the accident occurred, belonged exclusively to Hargrove, together with the ferry landings on both sides of the river.

Rogers was merely employed to superintend, and had no interest whatever in the property. About the time the action was instituted, Hargrove executed an instrument of indemnity to Rogers, acknowledging that he alone was liable as the owner of the Ferry, for whatever recovery might be had. A judgment was rendered for Ligon against both parties for \$2,260, from which an appeal was entered. Rogers now

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filed his separate plea, claiming entire exemption, upon the foregoing statement of facts, which he was prepared to maintain by proof. Pending the appeal, a compromise was agreed upon between the Representatives of Hargrove and Ligon, to the effect that the appeal should be dismissed—\$760 written off the verdict, leaving the judgment to stand for \$1,500; and to induce Rogers to consent to the adjustment, an agreement was entered into by all the parties in interest, that the money should be made, or all legal means used to make it, out of the estate of Hargrove, before coming upon Rogers, and upon this promise Rogers acceded to the arrangement. The previous portion of the agreement, as to the dismissal of the appeal, and the scaling of the judgment, was reduced to writing, signed by the respective attorneys of the plaintiffs and defendants, and put on the minutes of the court; the latter stipulation, postponing the property of Rogers from liability until the estate of Hargrove was first exhausted, was not in the instrument. The execution was issued and levied upon the property of the estate of Hargrove, which was amply sufficient for its payment,—no claim was interposed to arrest the sale,—the levy was, nevertheless, dismissed and the *fi. fa.* re-levied upon the goods of Rogers, who filed his bill, returnable to the April Term, 1845, of the Superior Court of Floyd county, wherein he sets forth the previous proceedings as herein recited, and charges also, that one William Solomon, who had taken possession of the whole of the assets of Hargrove, amounting to \$30,000, under some pretended claim against the estate, fraudulently combining with the Representatives of Ligon and Hargrove, had obtained the possession or control of the execution, and was seeking to enforce it against the property of the complainant, contrary to the express terms of the agreement, and without which, he, Rogers, never would have consented to the dismissal of the appeal, feeling full confidence as he did, of being acquitted from all responsibility upon the final trial. The bill further charged that Solomon well knew the terms of the agreement, under which complainant claimed to be protected, in the first instance, from the debt, and that he held the property of Hargrove's estate fraudulently, and without paying for it any consideration, and that the execution having been discharged, either by Solomon, or the representatives of Hargrove was *functus officio* and kept open, and sought to be collected illegally and covenantously out of complainant. It also affirmed that most of the material facts were in the knowledge of the defendants, or some of them, and could not be otherwise established, but by resorting to their consciences. It concluded by praying that the intention of the parties might be carried into effect, either by setting up that part of the agreement which did not appear upon the minutes of the court, as a separate and independent contract, or if in the opinion of the Chancellor that could not be done, that then the writing itself be re-formed, and the portion omitted therefrom innocently by mistake, or fraudulently by design, be incorporated therein; or that the appeal be reinstated, and a new trial ordered.

There was likewise a prayer for an injunction, which was granted when the bill was sanctioned, the 16th day of November, 1844. At the appearance Term of the bill, April ensuing, a motion was made to dissolve the injunction upon the following grounds, to wit:

1st. Because the complainant in his bill shows the residence of the de-

defendants to be out of the county of Floyd, except James M. Spallock; and that the injunction was granted on the 16th day of November, 1844; and that he has made no effort to have any of the defendants served, except said Spallock.

2d. Because the complainant has not by his said bill made such a case as entitled him to any decree in a Court of Equity against the defendants, or any of them, or to any discovery from, or relief against, them.

3d. Because the complainant had entered no appeal in the cause in which the execution sought to be enjoined was obtained; and no consideration, therefore, passed from him for any promise which may have been to him, if there was any.

4th. Because complainant seeks by his bill to alter the terms of a written contract, and to incorporate in it a new and different consideration from the one therein contained, by parol evidence.

5th. Because the bill is contradictory upon its face, seeking to enforce a separate parol agreement, different from the written contract, and charging also that the same parol agreement was left out of the written contract innocently, by mistake, or fraudulently, by design.

6th. Because the bill seeks to correct a mistake in a written agreement, and then to enforce a specific performance of it against an individual not a party to it, who is a purchaser, for a valuable consideration, and without notice of the mistake.

7th. Because if the execution were paid off, and delivered to William Solomon, as charged, he is entitled to collect the money due thereon, whether he has a written transfer or not.

8th. Because if the execution is paid off by any one, the complainant has a complete and adequate remedy at law.

9th. Because the bill seeks to adjudicate the rights of different individuals, entirely unconnected, and distinct and independent matters, requiring different decrees, as between the same defendants.

10th. Because an injunction has been heretofore granted, at the instance of complainant, against the defendants in this bill, upon the same facts, and for the same subject matter, and the bill dismissed and the injunction dissolved, upon a general demurrer, for want of Equity in the case made by the bill.

Upon this motion, Judge WRIGHT, before whom the cause was tried, pronounced the following judgment:

1st. The complainant's negligence in not having the bill served, nor making any effort to do so, for more than five months after the sanction of the injunction, is good cause not only for a dissolution of the injunction, but for a dismissal of the bill. Our injunctions (which Equity writers call a harsh writ) are granted upon ex parte hearings of the complainant; and it is a good rule, and one not to be dispensed with, that the complainant use all the means within his power to bring the bill to a hearing. The unqualified statement of counsel, in this case, that he acted under a misapprehension of the *practice*, and had advised his client that it was unnecessary to take measures for the service of the defendants out of the county until Term time, the court, in this instance, will take as a sufficient excuse for the delay.

2d. Ground being of a general nature, for the want of Equity, I pass and notice the specifications.

3d. Whether the appeal entered by complainant, as defendant at law, would have enabled the complainant to defend at law, or not, it is immaterial to decide ; it was at least a doubtful right, and therefore a sufficient consideration upon which to have a compromise.

4th and 5th. Grounds may be answered together. I cannot think, as insisted upon by complainant's counsel, that it constituted a separate agreement. Rogers signed the written agreement ; the consideration for the withdrawal of the appeal, both to the executors, and also to Rogers, by the writing, was the reduction of the verdict \$760. That the judgment should be first collected out of Hargrove's property, and Rogers thereby saved harmless, may have formed an additional consideration why Rogers signed the agreement ; but that, of itself, could not form a separate and distinct contract ; but though it does not form a separate agreement, yet if this consideration was left out by mistake, or fraud, is made to depend upon whether the court considered it a separate agreement or not. A past fact cannot depend upon a future contingency ; besides, pleading in the alternative is bad in Equity, as well as at Law. The allegation must be certain and positive. If, however, the complainant can make the amendment to his bill, by making the allegation positive, that it was to have formed part of the written agreement, and was left out by mistake, or by fraud, he may do so without prejudice to the injunction—otherwise the bill must be dismissed upon this ground.

6th and 7th. Although Solomon is made a party, it does not appear from the bill (which must be taken as true) that he is a purchaser for a valuable consideration ; but that he is a fraudulent and pretended purchaser, among other things, for the express purpose of preventing, by collusion with Ligon, and the executors of Hargrove, the collection of the money due upon the judgment out of the property of Hargrove's estate ; and if he has advanced the money upon the judgment for this purpose, with a full knowledge, as alleged, of Hargrove's liability, *first*, to pay the debt, and save Rogers harmless, it would, so far at least as Rogers is concerned, (who must stand in the attitude of a security, so far as relates to these parties,) be payment of the judgment. He cannot control the judgment by advancing the money upon it for the purpose of consummating a fraud.

8th. Though he might avail himself of payment at law, by illegality, there are other grounds of Equity, and a decree is necessary to incorporate the entire agreement into the written agreement which forms the record upon which the judgment is predicated ; besides, discovery is sought, &c.

9th. If Rogers is security, he is a creditor upon payment of the debt ; and it might well be inquired, whether the conveyance to Solomon, by the Executors, was fraudulent or not. Twenty different issues may be made in the same bill, without multifariousness, for the purpose of arriving at the main issue of the bill, as where property is fraudulently conveyed to different individuals, at different times ; but claiming through each other, for the purpose of defeating creditors, the fraud, in each transaction, may be inquired into in the same bill ; otherwise, Courts of Equity would be incompetent to render adequate relief.

10th. It is not true, as stated, that a bill was dismissed upon general

demurrer, at a previous hearing, upon the same facts, and for the same subject matter. This bill seeks to correct the record by incorporating the original consideration into it, which the other did not, but sought to enforce an agreement contrary to the record, leaving the record as it found it. Besides, this bill, if retained, will contain positive allegations of either fraud or mistake, in leaving out matters intended to have been incorporated in the written agreement, which the other did not. It does not follow that, because a bill has been dismissed, and the Injunction (of course) dissolved, upon a general demurrer, for a want of Equity, that it is such a dissolution upon the merits of the case that no second injunction can be granted. There is a distinction between the merits of the case, and the merits of the bill. The first does not mean, as insisted upon, the merits of the case made by the bill; that is, the merits of the bill. The bill is the case made by the bill, together with eight other parts, mostly formal; but the case made is essentially the bill. Therefore, an injunction may be dissolved upon the merits of the bill, without being dissolved upon "the merits of the case," within the meaning of the Statute. A bill, praying specific performance, without payment of the purchase-money or tender, would have no merits. There would be merits in a new bill, averring payment, about the same subject matter. Would a decision upon the first be a decision upon the merits of the case, or upon the merits of the bill?

At July adjourned Term of the Superior Court, defendants' Counsel again applied to have the Injunction dissolved. The application was refused, and complainant was allowed farther time to amend his bill. This amendment was made, by striking out so much of the original bill as seemed to set up the stipulation, for the benefit of Rogers, as a separate and independent contract, and making divers other alterations, therein alleging, distinctly and positively, among other things, "that the stipulation left out was a part of the written agreement; that it should have been incorporated therein; *that it was omitted by mistake*;" and the complainant prayed "that it might be reformed according to the *true intent and meaning* of the parties." At the March Term of the Superior Court of Floyd county, 1846, Judge Wright dissolved the Injunction, and ordered the execution to proceed, for the reason, that the complainant still refused or neglected to make the amendment required; and he reaffirmed the opinion expressed by him in April, 1845, and considered it made as of that term.

JOE ROGERS, by his attorney, WILLIAM H. UNDERWOOD, complains that there was error committed by the court below, in this—namely:

1st. That the original bill was good, and sufficient in law to entitle the complainant to have and maintain his suit against the defendants, and to call upon them to answer the same.

2d. That the amendment was substantially made, in conformity to the decision of the court, and the amended bill was sufficient to authorize and require the court to compel the defendants to answer.

3d. That in either the original or amended bill, there was enough charged to retain the injunction.

UNDERWOOD for plaintiff in error.

Decision admits that almost every charge is sufficient of itself to support the

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bill, and yet strangely determines, that unless an amendment can be made, so far as respects one of the charges, the bill must be dismissed; and when the amendment is made, still re-affirms the decision. The first charge in the bill affirms that complainant was not liable at law, and could not have been so held. (*Prince's Digest*, 734, 740; (1) *Taylor vs. Rushing*, 2 *Stewart's Rep.* 160. (2)) The second is, that he was prevented from relying upon this defence by the conduct of defendants. (1 *Johns. Ch. Rep.* 49, 91, 324; 2 *ib.* 225. Thirdly, the agreement set out on the minutes of the court is not, necessarily, all the agreement that was made; and the bill charged, properly, before it was ordered to be amended, that the agreement with complainant was separate, or if not, that it was part of the one agreement, and was left out by fraud or mistake. A bill may be framed in the alternative. (7 *Porter*, 144.) The court, therefore, erred in that part of the decision which affirms the contrary. But the bill, as amended, charges the agreement to be one entire agreement, and that a part was left out by mistake; which the court has power to reform.—1 *Mad.* 48; 1 *Ves.* 168; 2 *Atk.* 203; *ib.* 33; 2 *Johns. Ch. Rep.* 585. The agreement was on sufficient consideration.—*Chit. on Con.* 43, 44, 46, 47, 48, 63. The agreement with plaintiff most distinctly placed him in the attitude of security; and the dismissal of the levy is in equity a release.—*Pothier des ob.* 406, 7 *Johns. Rp.* 332; 2 *Johns. Ch. Rp.* 554; 5 *Bing.* 64; 8 *ib.* 161; 8 *Taunt.* 208; 9 *Wheat.* 680; 8 *Wend.* 512; 10 *Johns. Rep.* 587; 10 *Wend.* 162; *ib.* 126; 9 *Wheat.* 702; 15 *Wend.* 329; 14 *ib.* 165; 6 *Johns. Ch. Rep.* 264; 6 *Wheat.* 466; 11 *Wheat.* 184; 2 *Cowen* 129. Compromising.—2 *Kinney* 244. After all these charges are noticed, and taken to be true, the single question which presents itself is, can this bill be dismissed, or the injunction dissolved on demurrer.—*Mitford* 108, 111, 4, 5, 134, 159, 161, 164; *Eden on injunctions* 116.

AKIN for defendants in error, cited *Stephens et al. vs. Cooper et al.*, 1 *Johns. Ch. Rep.* 429; *Parkhurst et. al., vs. Van Courtland*; 1 *Johns. Ch. Rep.* 273; 2 *Starkie on Ev.* 548; and *ib. note P.*; *ib.* 550; *Gibson vs. Watts*; 1 *McCord's Ch. Rep.* 490 and 505; 6 *Cowen* 690; 1 *Johns. Rep.* 139; 7 *Johns. Rep.* 341; 3 *Johns. Rep.* 506; 1 *Johns. Rep.* 414; *Woollam vs. Hearn*, 7 *Ves.* 217; 1 *Cowen* 250; 1 *Johns. Ch. Rep.* 50; 2 *Maddox* 292-3; *Story's Eq. Plea.* 295, 301 and 311; *Story's Com. on Eq. Mistake*.

LUMPKIN, Judge, having stated the facts of the case, proceeded to deliver the opinion of the court as follows:

The view we take of this case, renders it unnecessary to examine the various questions which have been discussed by counsel. The decision complained of in the first assignment of error, requiring the original bill to be amended, was made before the act of the legislature was passed creating this court. We shall therefore, for the present at least, decline reviewing it. Whether we have the power to do so, is a point that has not been argued at bar, and as it may, and probably will be presented for adjudication hereafter, in a more direct and solemn form, we will not anticipate it. If this court could not assume jurisdiction over an interlocutory judgment, pronounced in the progress of a case, prior to its organization, which case did not terminate till after its establishment, it is quite obvious that the re-affirmance of that judgment on the final decision of the court below, when the point was not before it, could not

(1.) It shall be the duty of any person who may obtain such establishment, or order, or leave, to keep a good and sufficient ferry-flat or bridge, and to give due attendance thereat; and if any damage shall happen to any person or persons by reason of the insufficiency of such flat or bridge, the non-attendance or neglect of the ferryman or keeper of such bridge, the person so aggrieved or damaged shall and may have and maintain an action against the owner of such ferry or bridge.—*Prin. Dig.* 734.

Inferior courts to require the owners of ferries to give bond and sufficient security, in such sum as they may think proper, conditioned for their keeping in repair a good and sufficient flat, and attendance.—*Prin. Dig.* 740.

(3.) The *Alabama Digest*, referring to the case cited of *Taylor vs. Rushing*, 2 *Stewart's Rep.* 160, was read; when the court notified counsel, that they would not absolutely exclude digests of reported cases, but that such digests would not be considered as authority.

give to this court jurisdiction. We express no opinion, then, upon the sufficiency of the original bill, or correctness of the opinion delivered thereon.

The burden of the argument of counsel for the defendant in error has been, to establish the rule, that parol evidence cannot be received, to add to, contradict, or materially vary, a written agreement; and that the instrument itself must be considered as containing the true understanding between the parties, and as furnishing better evidence thereof than any which can be supplied by parol. We subscribe to the doctrine in all its amplitude, and a series of adjudications, both in England and in this country, in the State and national courts, have firmly and uniformly upheld the principle and placed it beyond the reach of successful attack. It would appear to be doing more than duty requires, an act of supererogation, to refer to the cases. When we reflect, however, that hitherto every thing in the jurisprudence of the State has been fluctuating, and that we are just now upon the threshold of our newly-compacted judicial system, under which what is *written will remain written*, we feel the necessity and importance of settling every principle upon the most solid foundation. In this way alone can we hope to fulfill the design of the Assembly in securing *stability*, as well as *uniformity* in the administration of the law.

In *Hoar and others vs. Graham and others*, (3 Campbell's Rep. 57,) the endorsee sued the endorser of a promissory note. The defence set up was, that the defendant refused to endorse the note, unless the plaintiff would agree that it should be renewed on becoming due. They did so agree. Instead of calling for a renewal they demanded payment at the maturity of the note. The evidence was held inadmissible. Lord Ellenborough says:—"The parol condition is quite inconsistent with the written instrument. The condition for renewal entirely contradicts the legal import of the endorsement. After the bill is drawn there may be a binding promise, for a valuable consideration, to run it when due. If the promise is *contemporaneous* the law will not enforce it." In *Powell vs. Edmonds*, (12 East 16,) an attempt was made to show by the auctioneer a parol warranty of the quantity of timber contained in the lot purchased, none such appearing in the written conditions of sale:—Thompson Baron, before whom the trial was had, ruled out the testimony, and the question came before Lord Ellenborough on a motion to set aside the verdict. "There is no doubt," says the chief justice, "that the parol evidence was properly rejected in this action; the purchaser ought to have had it reduced into the writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, I know of no instance, where a party may not by parol proof superadd any term to the written agreement, which would be setting aside all written contracts, and rendering them of no effect." Parol evidence was offered in *Woollam vs. Heurn*, 7 Vesey, to show that £50 was the yearly rent intended to be paid, instead of £73 10s., the price inserted in the memorandum of the lease, and repelled by the Master of the Rolls. "To admit," he observed, "to prove that the written instrument does not contain the real agreement, would be the same as receiving it for any purpose. It was to shut out that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms, it must in contemplation of law be looked to, to

contain the agreement,—as furnishing better evidence than parol can supply.”

The inflexibility of this doctrine is vigorously supported by all the judges in the case of *Woodbridge vs. Spooner*, (1 *Chitty's Rep.* 667, and condensed in 3 *Barn. and Ald.* 233,) where parol proof was adduced to show that a note payable *on demand*, was not to be collected until after the death of the maker. Abbott, C. J. said “The rule was too well established, that parol evidence cannot be admitted to contradict, add to, or vary the terms of a written instrument.”

Bailey, J. “It would be extremely dangerous and inconsistent with those general rules of evidence, by which we proceed in courts of justice, to allow a party, after giving an instrument, in which he says, ‘I promise to pay on demand, to say by parol evidence, ‘You know I did not mean to pay on demand, but I merely promise to pay when I die.’”

Holroyd, J. “Inasmuch as the evidence went to the extent of contradicting the note itself, it appears to me, that the case comes within the general rule of law, that *parol* cannot be admitted in opposition to written evidence.”

Best, J. “Here is a written instrument between the parties by which they are bound, and it would be contrary to the first principles of evidence to receive parol evidence, for the purpose of showing that the written contract is different from that which it is supposed the parties intended. I know of but one exception to the general rule, and that is founded in public policy, namely, where the contract is illegal; but if it cannot be shown that there was any illegality in the contract, the law must take effect.”

The same point was decided in a very similar case, *Mosely*, assignee of *Robinson*, a bankrupt *vs.* *Hanford*, (10 *Barn. and Cress.* 723)—vide *Peacock vs. Monk*, 1 *Vesey*, 128; *Clarkson vs. Hannah*, 2 *P. Wms.* 204; 8 *Term Rep.* 147, 379, 384; 2 *Wm. Black.* 1249; 2 *Bos. & Pul.* 565; 2 *Vesey*, 195; 6 *Vesey*, 333; *Dickens*, 295; 1 *Brown's Ch. Ca.* 92, 338; 1 *Bla. Rep.* 1202, and *Fell on Guaranties*, 57, 59.) The general rule of the Scotch law is to the same effect, namely, that “writing cannot be cut down or taken away by the testimony of witnesses.”—*Tait on Evidence*, p. 326–32; quoted by *Greenleaf on Evidence*, p. 315, n. 2.

We will next advert to a few leading American cases; they will be found equally explicit upon the point under consideration. The case of *Munford et al. vs. Macpherson et al.*, was an action upon a *parol warranty* upon the sale of a ship, “that she was completely copper-fastened.” The printed bill of sale was in the usual form, and contained no such warranty. In the progress of the argument, the court stopped counsel with this pregnant inquiry, “Can a case be found where an action has been brought upon a parol contract, made *una statu* with a written contract?” And Thompson, Justice, in delivering the opinion of the court, remarks, “It is not pretended that there was any fraud in this transaction. Had the plaintiff's claim rested on any deceit in the sale, the evidence would have been admitted; but the contract between the parties was reduced to writing, and is contained in the bill of sale, and recourse must be had to that instrument to ascertain its extent. It cannot be a safe and salutary rule to allow a contract to rest partly in writing and partly in parol. Whenever it is reduced to writing, that is to be considered as the evidence of th

agreement, and anything resting in parol, becomes thereby extinguished." (1 *Johns. Rep.* 414.) In *Howes vs. Barker*, (3 *Johns. Rep.* 309,) C. J. Kent says. "I have struggled hard, and with the strongest inclination to see if the form of the action would not help the plaintiff in this case; but I cannot surmount the impediment of the deed. Sitting in a court of law, I think I am bound to look to that deed as the highest proof of the final agreement between the parties." In *Maighley vs. Hamer*, (7 *Johns. Rep.* 341,) the court declared, "It is a settled rule that where the consideration is expressly stated in a deed, and it is not said, also, for divers other considerations, you cannot enter into any proof of any other, for that would be contrary to the deed. The remedy for the party, if the deed be contrary to the truth of the case, is by seeking relief in equity against the deed on the ground of fraud or mistake." (See also *Fitzhugh vs. Kuyon*, 8 *Johns. Rep.* 375; 2 *Cain*, 161; *Kirby's Ct. Rep.* 22.) In *Parkhurst vs. Van Courtlandt*, (1 *Johns. Ch. Rep.* 281,) the principle is thus strongly stated by the Chancellor; "I apprehend the rule to be too reasonable, and too well established to be now disturbed, that where an agreement is reduced to writing, all previous negotiations are resolved into the writing, as being the best evidence of the certainty of the agreement. Everything, before resting in parol, becomes thereby extinguished, or discharged. Parol proof cannot be resorted to, either to supply what may be uncertain or defective in the writing."

We conclude then that there is no rule of law better settled, or more salutary in its application, than that which refuses to admit oral testimony to contradict, vary, or materially affect, written agreements, whether specialties or simple contracts, and whether within or without the statute of frauds; and we believe that we are altogether safe in asserting that it has been recognised and adopted by every State in the Union.—4 *Ohio Rep.* 347; 16 *Sergt. & Rawle*, 108; 6 *Dana*, 156; 5 *Pick.* 38; 1 *Dev. & But.* 250; 6 *Halsted's N. J. Rep.* 275; 10 *Gill & John. Rep.* 404; 11 *Louis. Rep.* 133, 416; 6 *Porter's Rep.* 132; 5 *Yerger*, 194, 195; 7 *Leigh. Rep.* 632; 1 *McCord Ch. Rep.* 490. The question has been repeatedly adjudicated by the courts of the United States.—8 *Wheaton*, 174; 9 *Wheaton*, 581; 3 *Mas. C. C. Rep.* 378; *Peters' C. C. Rep.* 85, 199; *Gilpin's D. C. Rep.* 329; 3 *Dall.* 415; *Bald. C. C. Rep.* 489. To use the emphatic language of a popular modern law writer—"It has been so frequently adjudged by the courts on both sides of the Atlantic, as to have the resistless force of a maxim, that parol evidence cannot be received in a court of law, to contradict, vary, or materially affect, by way of explanation, a written contract." Indeed the rule itself seems never to have been questioned, by courts at least. The nearest approach to it, I have met with is by Mr. Justice Huston, in the case of *Thompson et al. vs. McClenachan et al.*, (17 *Sergt. & Rawle.*) His remarks as reported, are these: "There is scarcely any subject more perplexed than in what cases, and to what extent, parol evidence shall be admitted: not only have different men viewed the subject differently, but the same man, at different times, has held opinions not easily reconciled; and I doubt whether any lawyer, of many years standing, and much reflection can say his mind has never wavered upon the subject. In theory adhere to the writing, neither see nor hear anything out of the deed, seems to sound well, and it would work well in practice, if all who give instructions to scriveners were per-

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fect; if all scribes perfectly understood their instructions, and put them on paper perfectly according to law; and the whole was completed by executing them at the time, and in the order and manner which their nature and the law requires. But when this perfection cannot be even imagined to exist in this world, and the want of it is as apparent in deeds and other writings as anywhere else, the beautiful theory must yield to substantial justice." This railing accusation against the doctrine, or rather, we should say against the imperfection of everything human, so far from weakening, but demonstrates its impregnability. Equity comes in, as we shall hereafter see, to relieve the grievances, so vividly portrayed, leaving the rule at law to maintain its undisputed sway.

It is true that counsel occasionally when hard pressed, have insisted that "juries are the legitimate judges of the effect and the weight of evidence, and that the question between written and parol evidence, resolves itself at last into an inquiry as to the weight of evidence only, and that juries ought to have an opportunity of judging whether the terms of the contract are reduced to writing, or as orally agreed by the parties at the time of the transaction shall govern. They contend that to every contract, the consent of two minds at least is necessary, and that it is only on the evidence of such consent that the law enforces the observance of the contract, or furnishes the breach of it. This is an old professional device, to misrepresent the relative value of testimony, and it requires a degree of judicial excellence scarcely attainable to guard against the acuteness of counsel, when the known rules of evidence apply directly against their client. Who does not recollect the ingenious effort of the great Roman Orator, in his elegant oration for the poet Archias to elevate parol evidence even above records? (a)

But the reply uniformly from the Bench is—"The preference which the law gives to written evidence, when compared with parol testimony of parol agreements, is the unavoidable result of experience. It is impossible to expect that certainty or exactness in the one form of evidence which is found in the other; where a contract has been put in writing, assented to, signed by the parties concerned, and continues in being, evidence of other parol stipulations, before and at the same time, to explain or vary the written agreement, would be a rejection of that evidence, which is necessarily the best." While the application of the rule, as now laid down and expounded by the court, is admitted in deeds and other specialties, it has been argued that it did not apply to written simple contracts; that there was no distinction between written and

(a) "Est ridiculum ad ea quæ habemus nihil discere; quærere, quæ habere non possumus; et de hominum memoria, tacere, literarum memoriam flagitare; et, cum habeas amplissimi viri religionem, integerrimi municipii jusjurandum fidemque, ea, quæ depravari nullo modo possunt, repudiare, tabulas, quas idem dicis solere corrumpi, desiderare."

¶ Which, is translated by Duncan in his copy of Cicero's Oration, as follows:—"Now is it not ridiculous to say nothing to the evidences which we have, and to desire those which we cannot have; to be silent as to the testimony of men, and to demand the testimony of registers; to pay no regard to what is affirmed by a person of great dignity, nor to the oath and integrity of a free city of the strictest honor; evidences which are incapable of being corrupted, and to require those of registers, which you allow to be frequently vitiated?"

parol contracts; that they were of equal rank, and that the same evidence might be given as to the one and the other. The rule excluding oral testimony has been universally applied to simple contracts in writing, to the same extent as to specialities—and the reason of the rule applies to one, as well as to the other: When parties have deliberately put their engagements in writing, it shall be presumed to contain their whole understanding, so that oral testimony of conversations, or declarations at the time it was completed, or before, would tend often to substitute a new and different contract, for the one which was really agreed upon—and of course usually to the prejudice of the party opposed to it.

Again, it has been thought that there is a difference between that class of cases required by the statute of frauds to be in writing, and those not within the statute. But the authorities abundantly establish, that this restrictive application has not prevailed, and was expressly repudiated by the court in Massachusetts, in the case of *Stackpole vs. Arnold*, and the broad proposition adhered to by Justice Parker, that oral testimony is not to be received, to contradict, vary, or materially affect, by way of explanation, any written contract, whether under the statute of frauds, or not, provided the contract is perfect within itself, and is capable of a clear and intelligible exposition from the terms of which it is composed.

To prevent misapprehension, it may not be amiss to specify succinctly the modification of the doctrine and the exceptions to the rule. Where it is not necessary, in the first instance, to have the bargain reduced into writing, evidence of conversations *subsequent* to the time of making the agreement, would probably be admitted, to show that the parties agreed afterwards to vary the contract, or add some new stipulation. Here, the written agreement, so far as it purports to express the true meaning of the parties, up to the time of its execution, is not in any manner contradicted or impugned; but, from the proposed evidence, it would appear, that they afterwards varied, or *added to the contract*, which is not inconsistent with anything contained in the original agreement.—1 *Phil. on Ev.* 562; 1 *John. Cases*, 22; 5 *Cowen*, 249; *ib.* 497; 7 *Gill. & John.* 407; 4 *New Hamp.* 45; 3 *Fairf.* 441; 1 *Mar. Ken. Rep.* 582; 2 *M. Louisu. Rep.* 157; 6 *Halst. Rep.* 174; 2 *Baily*, 121, 113; 12 *Mas. Rep.* 481.—Nor does it matter how soon after the execution of the written contract, the parol one was made. If it was, in fact, *subsequent*, and otherwise unobjectionable, it can be proven and enforced; and that, too, when it relates to the same subject matter. In *Brewster vs. Countryman*, 12 *Wend.* 446, the court held that *parol evidence* of an agreement to indemnify, and save harmless, a purchaser of personal property is admissible, although the agreement in respect to the sale is reduced to writing, and contains no such stipulation, provided, the *parol agreement* was made subsequent to the written agreement. Here the vender refused to give a written warranty, but said, “I have sold you the property, it is yours, and I will see you out with it.” This indemnity was considered and adjudged to be valid. So much for the modification of the doctrine. And in view of this, and numerous other cases to the same purport, were we permitted to travel back so far, we might doubt, at least, the propriety of holding the contract made with Rogers, as a part of the original agreement, so much so as to make it absolutely necessary to reform the writing—the minutes by having it inserted. At any rate, it would seem to

have been proper to have submitted it, as a matter of fact, for the jury to find whether, in point of time, it was not *subsequent* to the arrangement agreed upon between the administrators of Ligon, and the executors of Hargrove, and based upon a new and distinct consideration. The representatives of the two estates were the parties to the contract in writing; and the same representatives of the *one part*, and Rogers of the *other part*, parties to the stipulation omitted. The interest, too, of the co-defendants, so far from being identical, except in the diminution of the verdict, was antagonistic, especially as it regarded the collection of the claim. So much of the agreement as was put in writing, and entered on the minutes, was necessary to dispose of the litigation then pending, and became the judgment of the court. This consent of the parties, through their counsel, was the only authority of the court for dismissing the appeal, and lessening the damages recovered on the first trial; the part left out was not only not necessary to be placed on the records, but *could not have been enforced*, in the controversy then before the court. Some of the exceptions are plainly enumerated by Justice SUTHERLAND, in the case of *Erwin vs. Sanders and Ely* (1 Conn. 249). "The rule," says he, "does not exclude parol evidence of fraud, or the want or failure of consideration in, nor the enlargement of the time for performance, or the waiver of the performance of a written simple contract." The rule is directed only against the admission of any other evidence of the *language* employed by the parties in making the contract, than that which is furnished by the writing itself; no other words are to be added to it, nor substituted in its stead. Surrounding circumstances may be invoked, to cast light upon the meaning of the parties. The rule does not exclude the *testimony* of experts to aid the court to interpret truly the instrument. Parol evidence is admissible to explain latent ambiguities, to rebut an equity, and to contradict a receipt; nor is the rule which repudiates it infringed by any evidence of *known and established usage*, respecting the subject to which the contract relates.—*Greenleaf on Ev.* 315, 754.

And in the case of *Gibson vs. Watts*, in the Court of Appeals of South Carolina, it was admitted, that "when a mistake has been made by the misconception of the scrivener, or error in calculation, or any other obvious mistake, that parol evidence may be let in to show such mistake." And it is to that branch of the case, that the court proposes now to address itself: And it will be found that the extent to which adjudications have gone in granting relief, will be a complete answer even to the complaints of the Pennsylvania functionary in his arraignment of a rule, venerable alike for its antiquity and good sense.

In England, as well as in this country, it has been the steady language of Chancery, that a Court of Equity has the power to reform a written agreement, and to supply by parol proof so much thereof as may have been left out by fraud or mistake. But while the rule itself is admitted, some difference of opinion or doubts seem to exist as to its application. While this species of evidence has been uniformly received in behalf of a defendant,—a plaintiff seeking specific performance has not always been treated with the same indulgence. Indeed the English Courts have repeatedly expressed a strong inclination, not to decree in favor of plaintiffs seeking not to set aside the agreement, but to enforce it, when it is reformed by the parol evidence. They affirm that the difference of *rigor*

and condition as to the plaintiff and defendant, of evidence offered for the purpose of obtaining a decree and resisting it, exists in the code of every civilized nation. *Favorabiliores, rei potius quam actores habentur*—being the maxim of the civil law, and *potior est conditio defendentis* the familiar language of theirs. The ground of the distinction is this,—When a party has entered into a written agreement, and seeks as plaintiff a specific performance of it, he must rely on the agreement as it stands,—he can neither add to, vary nor explain any of its terms, by parol proof. If he cannot enforce the true contract, he still retains all he ever was in possession of. He may suffer disappointment, which, as the consequence of his want of caution and explicitness, he must bear. But not so with the defendant. He might encounter not disappointment only, but sustain ruinous loss, if compelled specifically to execute an agreement different from that which he contemplated. Were this distinction tenable, Rogers is in the attitude of one who has fully and completely, and at the sacrifice of his rights at law, executed his part of the agreement, in submitting to the dismissal of the appeal, upon the trial of which he would probably have escaped all liability, and is now insisting that it is unjust, and unconscientious in his faithless adversaries not to abide by the whole of the terms thereof. Judge STORR in his learned commentary upon this branch of equity jurisdiction, remarks “that it is extremely difficult to perceive the principle upon which the foreign decisions can be supported, consistently with the acknowledged exercise of power in the court, to reform written contracts and to decree relief thereon.” It will be found I apprehend that nearly all the cases, in which relief has been refused to the plaintiff were under the statute of frauds, and most of them respected an interest in land, and here parol proof is always received with great caution.

We will not undertake to review the transatlantic authorities. The task has been ably and admirably performed by CHANCELLOR KENT, the Father and ornament of the American Bar, in the case of Gillispie and wife, against Moore, and the conclusion at which he arrived was, that the mistake may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake *affirmatively by bill*, or *as defence*.—2 *Johns. Ch. Rep.* 15, 85. He declares that it would be a great defect in what LORD ELDON terms the moral jurisdiction of the court, if there were no relief in such cases; that he has looked into all the cases under this head of Equity jurisdiction, and that it appears to be well and thoroughly established, and on great and essential grounds of justice, that relief can be had against a deed or contract in writing, founded in mistake or fraud, whether it was to the prejudice of the one party or the other. And in a later case, *Reiselbroek vs. Livingston*, (4 *Johns. Ch. Rep.* 144,) the same eminent jurist says, “The Master of the Rolls stopped short of relief in the case of *Woollam vs. Hearn*, (7 *Ves.* 211) where a mistake was alleged, because he said there was no precedent allowing parol proof to correct a mistake in *favor of a plaintiff* seeking specific performance of an agreement. I am not sufficiently instructed at present to admit the soundness of this distinction, which holds parol evidence admissible to correct a writing *against* but not in *favor of a plaintiff*. LORD HARDWICK does not appear to have been aware of any such distinction in the two cases to which SIR Wm. GRANT refers; and why

should not the party aggrieved by a mistake in the agreement have relief, as well where he is plaintiff as where he is defendant? It cannot make any difference in the reasonableness and justice of the remedy. If a court has a competent jurisdiction to correct such mistakes, (and that is a point understood and settled,) the agreement when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same *protection*, when made accurate under the decree of the court, and when made accurate by the act of the parties. The one case illustrates the other, *res accedent lumina rebus*.

Treading in the footsteps then of HARDWICKE, ELDON, KENT, STORY and other distinguished Judges of the mother country, our sister States, and of the United States, we hold that parties, whether plaintiffs or defendants, whether seeking to set aside and cancel an agreement, or reform and enforce it, can be relieved, as well on account of *mistake* as *fraud*. It would be monstrous to suppose that the arm of the Judiciary of Georgia was too short, or too weak, to reach and relieve, provided the contract variant from the true one could once be got into writing! This doctrine was pushed perhaps to its extreme limits by the Supreme Court in the case between *Hunt* and the administrators of *Rousmaniere* (1 *Peters' Rep.* 1.) Hunt filed his bill on the Chancery side of the Circuit Court of the United States for the district of Rhode Island, setting forth that he had, at two several times, loaned Rousmaniere money, for which, in addition to the notes, he was to have, as collateral security, a bill of sale, or mortgage, of the interest of the borrower in two ships. The *Nerius* and the *Industry*. Upon consultation with counsel, Rousmaniere executed to Hunt a power of Attorney, authorizing him to make titles to himself, or any other person, to his (Rousmaniere's) interest, in those vessels, upon the non-payment of the notes at maturity; and in the event of their loss, (being then out at sea,) to collect and appropriate to his demand the premium which would be due upon the policy of insurance. This security was taken under a mistake of law, that the power of attorney would bind the property equally with a mortgage, in case of death or other accident. Rousmaniere died intestate and insolvent, having paid a small part only of the debt, and this bill was brought by the creditor against the administrators, to get a priority of lien on the assets of the deceased, in preference to the general creditors. The case was vigorously contested and thoroughly discussed, twice before the Circuit, and twice before the Supreme Court.—2 *Mason's Rep.* 244, 342; 8 *Wheaton*, 174; 1 *P. S. C. Rep.* 1, 14. Chief Justice MARSHALL delivered the opinion of the Court upon the first hearing at Washington, from which we extract the following sentences, "Although we do not find the naked principle that relief may be granted, *on account of ignorance of the law*, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake is beyond the reach of equity." "No proof of *actual mistake* is required, the existence of an antecedent equity is sufficient;" that is to authorize the court to presume it: and the decree concludes thus: "And we are unwilling, where the effect of the instrument is acknowledged to have been entirely mistaken by both parties, to say that a court of equity is incapable of affording relief."

The court, however, finally denied relief, upon the ground, that t^h

could not substitute another and distinct security from that selected by the parties; that to do this would be equivalent to making a new agreement, not contemplated by either party, *instead of* executing that actually made. Judge STORY, who presided on all the successive trials, in referring to this case in his Treatise on Equity, says, "Equity may compel parties to execute their agreements, but it has no authority to make agreements for them, or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain in it what the parties had agreed on, that would have formed a very different case."

Mr. Justice WASHINGTON, who pronounced the final judgment, lays down these general principles as incontrovertible, namely, that, whenever an instrument which purports to set out the contract, violates by omissions or insertions the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity in the instrument to the agreement; and he assigns this obvious and most sensible reason: The object of courts is to carry out the contracts of parties fairly and legally entered into, and if the instrument, from want of skill or mistake, or *for any other cause*, is insufficient to execute the intention of the parties, the writing itself might be enforced, but the agreement itself would remain as unexecuted, as if one of the parties had refused altogether to comply with his engagement; and a Court of Equity will, in the exercise of its acknowledged jurisdiction, afford relief as well in one case as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it, and the manifest intention of the parties. So if the mistake exist not in the instrument itself, which is intended to give effect to the agreement, but in the agreement itself, if it clearly proved to have been the result of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought." And to this extent we are prepared unhesitatingly to go in the present case. Taking the statements of the bill as true, and the motion to dissolve the injunction for the want of equity, like a general demurrer, admits them to be true, we ask, does the instrument on the minutes of the court, and which, it does not appear was ever seen by Rogers, carry into effect the *agreement* of the parties? On the contrary, is it not manifest that one of its most important provisions was omitted by want of skill in the draftsman, surprise, or some other cause? And would it not be contrary to the first principles of justice, to permit the representatives of Ligon to enjoy the full benefit which they derived from it, and refuse relief to Rogers? And that, too, when in his amended bill, he plainly and positively alleges that the part left out, was a portion of the contract attempted to be put in writing, that it ought to have been incorporated therein, and was omitted by mistake; and the complainant prays to have the instrument reformed according to the true intent and meaning of the parties? It is the unanimous opinion of the court, that the court below committed error in adjudging these allegations insufficient to entitle the complainant to the answers of the defendants, and a decree in conformity with the nature of his case, and to have the injunction in the mean time retained.

As to the third ground, we are clear that, without disturbing the writing, there was enough in the bill to have authorized and re-

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quired the injunction to be retained. A judgment was obtained against the estate of Hargrove and Rogers for \$1,500. Rogers, by the declaration of Hargrove, under his own hand, as well as by law, (*Prin. Dig.* 734, 740 ; 2 *Stewart's Rep.* 160,) stands in the attitude of security only to the debt: an execution issues, is levied on the property of the principal, more than sufficient to satisfy it, nothing is done to prevent the sale, when Solomon, with a full knowledge that the estate of Hargrove was primarily liable, purchases the whole thereof, of the value of \$30,000, under some pretended claim as it is alleged, takes the control of the fi. fa., dismisses the levy, and has it relevied upon the goods of Rogers, and that too, as it is charged, after he, or the representatives of Hargrove, had discharged the demand ; and all this done fraudulently, and under a combination to oppress Rogers, by coercing the money out of him, contrary to the explicit acknowledgment of his co-defendant, when in life, that he alone was responsible. We will not characterize such conduct by branding it as flagrantly unjust, or extremely culpable ; we think, however, that it would strike the dullest apprehension at a glance, that it required to be vindicated, or at least explained, by the defendants, in their answers ; and instead of assailing the equity of the bill, the wiser course, perhaps, would have been to have met these grave charges by a total denial of them, provided they were unfounded. We do not sit here, however, to give advice, but to do justice to these litigants.

It is, therefore, ordered and adjudged by the court, that the bill, as amended, contains matter good and sufficient in law to entitle the complainant to the answers of the defendants ; and it is further ordered that the injunction be reinstated.

No. 6.—JOHN H. LUMPKIN and WESLEY SHROPSHIRE, et al., plaintiffs
in error, vs. THOMAS H. JONES, defendant in error.

By the 13th section of the charter of the Western Bank of Georgia, it is declared : " The said corporation shall not at any time suspend or refuse payment in gold or silver of any of its notes, bills or obligations ; and if the said corporation shall at any time refuse or neglect to pay on demand any bill, note or obligation issued by the corporation, according to the contract, promise or understanding, the charter hereby granted shall be forfeited," &c. And by the 20th section of the charter, it is provided, that " all transfers of stock in said bank shall be wholly void if made within six months *previous* to the failure of said bank," &c. A refusal, therefore, of the bank to redeem its notes, bills, obligations, &c., was such a *failure*, in the contemplation of the charter, as to make void all transfers of stock made within six months previous to such refusal, and to render the stockholders, so transferring, liable for the debts of the institution, notwithstanding such transfer. It was not necessary that the insolvency of the bank should have been *judicially* ascertained to establish the fact of a failure, within the meaning and intention of the Legislature.

Though the temporary suspension of specie payments in the year 1838 was in the meaning of the charter a *failure of the bank*, yet a subsequent resumption—in pursuance of the Act of 18th December, 1840, which was intended to relieve the suspended banks from the liabilities they had incurred under their charters, on account of their failure to redeem their liabilities in gold and silver—cured that failure, so as to affect the rights of the parties in the sale of stock.

This was an action of Assumpsit, tried before Judge WRIGHT, in the Superior Court of the county of Floyd.

It was predicated upon a note of hand for \$892 50, dated March 11, 1841, due six months thereafter, payable to defendant in error, and subscribed by one Robert Ware, and the plaintiffs in error, John H. Lumpkin and Wesley Shropshire. Ware having died, Lumpkin and Shropshire were the only parties originally sued. At October Term, 1843, of the court below, a verdict was rendered against them, from which they appealed, giving Thomas Treadaway, the other plaintiff in error, as their security on appeal. Several pleas were filed by the plaintiffs in error, alleging that the note sued on, was given for shares of bank stock in the Western Bank of Georgia, and that the bank suspended specie payments and failed within six months after the transfer of the stock and the giving of the note; and that the contract upon the said transfer of stock and the giving of said note was, therefore, void. Also, failure of consideration, &c.

At the January Term, 1845, of the court below, the case came on for trial, when the note sued on was introduced, and read in evidence to the jury. It was then proven on the part of the plaintiffs in error, by the depositions of Thomas Pullum, that the note sued on was given for bank stock of the Western Bank of Georgia; that it was made on the 11th of March, 1841, and the transfer of the stock was made on the books of the bank on the same day; that the said bank, (at the time of taking his answers,) was insolvent, and utterly unable to meet its liabilities or redeem its bills; that it suspended the payment of its bills and liabilities on the 31st of August, in the year above mentioned, and has not resumed the payment of its bills or liabilities since that time; that witness held the offices of clerk and book-keeper in said bank from January, 1840, till the latter part of the year 1843.

Thomas C. Hackett testified that the defendant in error admitted to him that the note sued on was given for bank stock of the Western Bank of Georgia.

The defendant in error then proposed to prove that the said bank had suspended specie payments in the year 1838; to which it was objected by counsel for the plaintiffs in error, that the proposed testimony was not rebutting, and that proof of a preceding suspension could not affect the failure of the bank, which had been proven to have taken place on the 31st of August, 1841; which objection the court below overruled, and admitted the testimony. The plaintiffs in error excepted.

It was proved by a witness that about the last of August, 1841, he had a twenty dollar bill of its money, and that the bank did not pay specie to him, though demanded; and by another witness the suspension in 1838 was proved. On the part of the plaintiffs in error, it was then proved that frequent draws upon the bank for considerable sums of money were made during the spring and summer of 1841, all of which were honored, until about the last of August of that year.

Whereupon the cause was argued in the court below, before the jury; and the presiding Judge (WRIGHT) charged that, by the thirteenth section of the Act incorporating the Western Bank of Georgia, which declared that, in case of suspension of specie payments, it was ascer-

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tained what should amount to a failure of the bank. That the suspension of specie payments in the year 1838 was a failure of the bank: that no subsequent resumption could cure that failure, so as to affect the rights of these parties; and that there could be but one failure to affect the sale of stock. To which charge of the court below, the plaintiffs in error excepted. After the charge, and while the jury were retiring, the attention of the court was called to the Act of 1840 to compel the several banks of this State to resume payment of their liabilities in specie, and to provide for the forfeiture of the charters of such as might refuse, but the judge below declined charging further: which was also excepted to.

The plaintiffs assigned for error:—

1st. That the testimony admitted for the plaintiff below as to the fact of the suspension of the bank in 1838, was not rebutting to the testimony previously given by the defendants below, of a suspension and failure in 1841; and that the judge erred in admitting such testimony.

2d. That the judge erred in charging the jury that the temporary suspension in 1838 was within the meaning of the charter a failure of the bank, and that no subsequent resumption could cure that failure, so as to affect any subsequent sale of stock.

3d. That the judge erred in not charging the jury as to the operation of the act of 1840, requiring the banks to resume specie payments.

A. D. SHACKLEFORD, for plaintiffs in error, cited Charter of the Western Bank of Georgia, *Prince's Dig.* Pamphlet of acts of 1840, page 27. *The People, vs. The Bank of Niagara*, 6 Cowen, 209. *The People, vs. The Bank of Hudson*, 6 Cowen, 217. *Terrett et al., vs. Taylor et al.*, 9 Cranch, 50.

J. A. JONES, for the defendant in error, cited *Prince's Dig.* 130, 131, sec. 13, 19, 20, Western Bank Charter, and contended that if the refusal to pay specie on the 31st of August, 1841, was such a failure as avoided the transfer of stock made within six months before such refusal, then the refusal to pay in 1838 amounted to such failure, if it did not, then there was no proof of failure at any time. That it not appearing by the record that the act of 1840 had been relied on in the court below by the plaintiffs in error, and the court's attention not being called to it until the jury were retiring, it was then too late, and the court committed no error in refusing to charge the jury further.

Wm. Martin, also for defendant in error, contended:—

1. A failure of the bank, as named in the 20th section, is a refusal to perform any of the duties named in the 13th section of the charter.

2. That if the above view was incorrect, no failure had occurred at any time, as the refusal to pay specie in 1841 was the only failure insisted on.

3. If a refusal to pay in 1841 was a failure, the refusal in 1838 was equally a failure.

4. The act of 1840 by its caption prohibited the construction that it was a grant of any new privilege:—its object was to compel a resumption, and to punish a non-compliance.

5. If the act of 1840 be construed as a pardoning statute, the same was on condition of a resumption of specie payments on the 1st of February, 1841. And the judge below did not err in charging the jury that the refusal to pay in 1838 was a failure of the bank, as there was no evidence of a resumption on the 1st of February, 1841. The resumption proved, as appears from the evidence on the trial below, was after the date of the note, and sale of the stock.

J. W. HOOPER, for plaintiffs in error, in reply was stopped by the court.

Judge LUMPKIN declined presiding in this case, in consequence of one of the plaintiffs in error being a relative. Judges Warner and Nisbet being on the bench, after hearing argument, Judge Warner delivered the opinion of the court.

It is alleged on the part of the plaintiffs in error that the court below erred, in admitting testimony going to show a suspension of specie payments by the bank in the year 1838. The plaintiffs in error relied on the fact that the bank refused to pay specie in the year 1841, as good ground of defence in the court below, by virtue of the 20th section of the Act incorporating the Western Bank of Georgia, (*Prince's Dig.* 131,) which declares "All transfers of stock in said bank shall be wholly void, if made within six months *previous* to the failure of said bank, &c." The plaintiffs in error insisted the note sued on was given for bank stock, *within six months previous* to the suspension of specie payments by the bank in the year 1841. The defendant in error offers evidence to prove the bank suspended specie payments in the year 1838—more than six months before the note was given, which evidence in our opinion was properly admitted in the court below, for the reason, if there was a failure of the bank in 1838, then the note sued on was not given for bank-stock within six months previous to the failure of the Western Bank of Georgia, as contemplated by its charter.

The second ground of error assigned is to the charge of the court. The court below charged the jury "the temporary suspension of specie payments by the bank in 1838 was within the meaning of the charter, a failure of the bank, and that no subsequent resumption could cure that failure, so as to affect any subsequent sale of stock."

The charge of the court involves the question as to what is to be considered a *failure* of the bank within the meaning of its charter. By the 13th section of the charter, it is declared, "The said corporation shall not at any time suspend or refuse payments in gold or silver, of any of its notes, bills or obligations, and if the said corporation shall at any time refuse or neglect to pay on demand, any note, bill or obligation, issued by the corporation, according to the contract, promise, or understanding therein expressed, the charter hereby granted shall be forfeited, &c."

By the charter of the Western Bank of Georgia, important privileges are granted to the stockholders, in return for which certain duties are imposed; one of paramount interest to the public is, that payment of the notes, bills, or obligations of the bank, shall be made on demand in gold or silver. The 20th section of the charter provides, "all transfers of stock in said bank shall be wholly void, if made within six months previous to the failure of said bank, but that said stockholders so transferring, shall be deemed, and held liable for the debts of the institution notwithstanding such transfer." It was said on the argument of this cause, the bank could not be considered as having *failed*, until it had been *judicially* ascertained it was insolvent. Without pretending to say the bank was *insolvent*, or that its charter was *forfeited* by its refusal to pay its bills in gold or silver on demand, without judicial investigation; we are of the opinion, such refusal was a gross violation of duty on the part of the bank; and was such a *failure* to accomplish the objects contemplated by the charter, as to make void all transfers of stock made within six months previous to such refusal or failure to redeem its bills in gold or silver—and that the stockholders transferring their stock, after such failure or refusal of the bank to redeem its bills, according to the express terms of the 13th section of the charter, would be liable for the debts of the in-

We place our decision on the obvious intention and mean-

ing of the Legislature, as gathered from the different sections of the charter itself, and are of opinion there was no error in that portion of the charge of the court, "that the temporary suspension of specie payments in the year 1838, was within the meaning of the charter a *failure of the bank.*"

But when we take into consideration the intention of the Legislature, in the passage of the Act of 18th Dec. 1840, (*Hotchkiss Dig.* 362) as well as the effect of it, extending the time to such of the banks as theretofore had suspended specie payments until the 1st of February, 1841, to redeem their liabilities in gold and silver, we are of the opinion the court below committed error in that part of the charge in which the jury were told, "no subsequent resumption could cure that failure, (*the failure in 1838,*) so as to affect any subsequent sale of stock.

The Act of the 18th Dec., 1840, was intended to relieve the suspended banks from the liabilities which they had incurred under their charters, on account of 'their failure to redeem their liabilities in gold and silver; and this view of the question is strengthened by the Act of 10th Dec., 1841, which authorizes the governor to arrest the judicial proceedings against certain banks which had been instituted under the provisions of the Act of 1840; provided such banks should redeem their liabilities in specie, by the first day of January then next.—*Hotchkiss* 363. If then the Western Bank of Georgia did, in accordance with the provisions of the Act of 18th Dec. 1840, redeem its liabilities in gold and silver, such redemption, or resumption on the part of the bank, in the opinion of the court, did cure the temporary suspension by the bank, in the year 1838—so as to affect the rights of the parties in the sale of stock. The note sued on bears date 11th March, 1841, and consequently the bank stock was transferred subsequent to the Act of 18th Dec., 1840. Whether the bank redeemed its liabilities in specie on the first day of February 1841, or not, this court expresses no opinion. All we intend to say is,—in our judgment, taking into view the Act of 1840, the court below erred in charging the jury, "that no subsequent resumption could cure the failure of the bank to redeem its liabilities in gold and silver in 1838, so as to affect any subsequent sale of stock." Let a new trial be granted.

No. 7.—GABRIEL HARRISON and RICHARD W. WRIGHT, administrators of EDMUND BUTTS, deceased, plaintiffs in error vs. JOEL WALKER, defendant in error.

“*Legis posteriores priores contrarias abrogant.*” When the provisions of a later statute are opposed to those of an earlier, the last mentioned must be considered as repealed.

When there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.

A statute repealing a former statute, being itself repealed, the first statute is revived. The Act of June, 1806, providing that when any action shall be instituted within time and the plaintiff be nonsuited, or shall discontinue the same, after the time of limitation is expired, he shall be permitted to renew his action within six months thereafter, once only and not after, has been repealed.

This was a suit in equity brought in the Superior Court of the county of Putnam, for the purpose of recovering back usury from the defendant in error alleged to have been paid by complainants' intestate, while in life. The defendant answered the bill, and also pleaded specially the statute of limitations.

The case came up for trial in the court below at March Term, 1846, before Judge MERRIWETHER, and the bill, answer and plea having been read, the counsel for the complainants tendered in evidence the record of a former suit between the same parties, and for the same cause of action which had been commenced within time and afterwards dismissed, by which record it appeared that the present suit in equity was commenced within six months after the dismissal of the former suit.

The defendant's counsel objected to the evidence upon the ground that it did not tend to relieve the complainants from the bar of the statute of limitations:—Whereupon the judge of the court below sustained the objection, upon the ground that the act of June, 1806, under which the complainants relied, had been repealed,—and that the recommencement of a suit within six months from its dismissal, was not within the saving of the statute of limitations of force in this State. To which decision and judgment of the court below the complainants' counsel excepted, and assign for error.

1st. That the court erred in rejecting the record of the proceedings in a former suit between the same parties, in relation to the same cause of action on the grounds stated.

2d. The court erred in deciding that an act passed on the 26th of June, 1806, authorizing the commencement of one, within six months after the dismissal of a former action for the same cause, notwithstanding the statute of limitations might have run against said cause of action, was repealed, and that therefore complainants' right of action was barred by the statute of limitations.

F. H. CONE, for plaintiffs in error.

The only
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Bill of Exceptions is whether the Act of Limitations, passed
and by the Act of December, 1806.

Harrison et al. vs. Walker.

The Act of 1805 (*Clayton*, 269) repeals the Act of 1767, and is a general Statute of Limitations. The Act of June, 1806, (*Clayton*, 303,) authorizes writs to be commenced once, in six months after the nonsuit or discontinuance, and repeals that part of the 2d section of the Act of 1805 that prohibited it. It also repeals the 5th section of the Act of 1805, that repealed the Act of 1767. The Act of December, 1806, revives the Act of 1767, and repeals all Acts that militate against the intent and meaning of that Act, (*Clayton Dig.* 344.) The simple question, then, is, does the Act of June, 1806, militate against the Act of December, 1806? At common law, when a prior statute is repealed by a subsequent one, the repeal of the subsequent statute revives the first statute, (*Tucker's Com.*, vol. 1, p. 16; 7 *Cowen*, 536.) If there are two affirmative statutes, (as in this case,) and they do not necessarily conflict, they must both stand, as repeals by implication are not favored, (2 *Washington's Rep.*, 299; 9 *Cowen*, 437; 4 *Coke's Rep.*, 63; *Dyer*, 343; 6 *Modern*, 287; 14 *Petersdorf*, 516.)

HARDMAN for Defendant in Error.

By the court—NISBET, Judge.

To a bill brought by the plaintiffs in error, in Putnam Superior Court, the defendant, having answered, also plead the Statute of limitations; to which plea the plaintiffs in error replied the commencement of a former suit, for the same cause of action, before the Statute Bar had attached, between the same parties, its dismissal, and the suing out of their present bill within six months from the dismissal of the first suit. The plaintiffs in error contended that the Act of June, 1806, which authorized a plaintiff having brought suit within time, which suit was nonsuited or discontinued, to sue again within six months from such discontinuance or nonsuit, and thus avoid the Statute Bar, was still unrepealed, and of force in Georgia. Whereas the defendant in error contended the Act of June, 1806, was repealed. The question was made in the court below, upon a demurrer to evidence, the judge then determining that the Act referred to was repealed. Upon that decision the error complained of is founded, and this court is now called upon to decide whether the Act of June, 1806, is still of force in Georgia. The Act of the Legislature passed in 1767 embraces the main body of our Law prescribing the different terms of limitation. It has been once repealed, and in some particulars modified, but is at this day of force in most of its provisions. It defines the terms of years which shall bar personal actions, and among these (an action on the case) is the action first instituted between the parties now before this court. The Act declares that this form of action shall be commenced within four years after the cause of action arises, and not after. It farther provides that in case of reversal, or arrest of judgment, rendered for the plaintiff—or in case of the defendant's outlawry, and reversal of such outlawry—the party plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action, or suit, from time to time, within a year after such judgment reversed or arrested, or outlawry reversed. And these, so far as this action and all other personal actions are concerned, are the only exceptions to, or qualifications of, the limitations which the Act of 1767 enacts. These provisions of that Act are necessary to be borne in mind in order to a fair understanding of this opinion. (*For the Act of 1767 see Prince*, 575.) The Act of 1767 was repealed by the 5th section of the Act of 1805, which latter Act made some alterations in the law of limitations. Reference to this last named Act is not impor-

otherwise than in so far as it is part of the legislation of our State upon this subject, the history of which it is desirable here to trace. *The 5th section of the Act of 1805, which repeals the Act of 1767, was itself repealed by the Act of June, 1806, which last repealing act revived, without limitation or restriction, the Act of 1767. Not only so, but in the Act of June, 1806, the Act of 1767 is declared to be in full force, as to "all actions, and causes of actions, which originated under it." A statute repealing a former statute being itself repealed, the first statute is revived. It is in this Act of June, 1806, that the provision is found under which the plaintiff, in the action below, sought to resist the statute of limitations. And it is, as to this Act, that the controversy arises. That provision is in the words following, to wit: "That when any action shall be instituted within the time limited in the said recited act, and the plaintiff be nonsuited, or shall discontinue the same after the time of limitation is expired, that he shall be permitted to renew his action within six months thereafter, for one time only, and not after; and so much of the 2d section of said Act as is repugnant thereto be and the same is hereby repealed." This Act (June, 1806) does two things: first, it gives to plaintiffs the right, in case of discontinuance or nonsuit of actions instituted within the time limited by the Act of 1805, to renew their suits within six months after the discontinuance or nonsuit. And by this Act there is no doubt but that by such renewal the statute bar would be avoided. The other thing effected by it is a revival of the Act of 1767. Now, inasmuch as the Act of 1767 is revived by the Act of June, 1806, and made the law of the land; and inasmuch as this Act of June, 1806, contains also a provision (the provision above recited) not found in, and (as is alleged) inconsistent with, the Act of 1767, therefore the new provision is claimed by counsel for the defendant in error to be a nullity, and of course not now of force. The court does not admit the conclusiveness of this reasoning; and did the legislation upon this subject stop here, it could not arrive at the conclusion upon this subject to which it has arrived. We do not believe that the provision recited is repugnant to the Act of 1767, which is revived; it is only in addition to that Act. The Legislature must have intended to revive the Act of 1767, and, at the same time, give to plaintiffs a right which, under that Act, they did not possess. The revival of an Act, and a distinct enactment in relation to the subject matter of the revived Act, being found in the *same statute*, makes the construction less difficult. In the construction of a statute, it is the duty of the court, if possible, to give effect to each of its enactments. All the legal presumptions are against an intended conflict of provisions in the same Act. It would be a reflection upon the Legislature to suppose that they perversely intended a conflict, or were, from ignorance, incapable of preventing it. Thus, then, in December, 1806, the Act of 1767 stood revived, and with the additional enactment of June, 1806, was the law of the land. At this time the Legislature seems to have made a careful revision of the statutes of limitation, and, by the Act of 8th December, 1806, in express enacting words, declared the Act of 1767 to be revived, and in full force and operation, from the first day of February, 1793. That Act was already, as we have seen, in force, and why now, with such careful particularity, again revive it, it is difficult to see—unless the Legislature intended to set it up, independent of all adjuncts and accessory enactments, as the law of limitations.

Harrison et al. vs. Walker.

The Act of December, 1806, is entitled an Act "to revise and continue in force" the Act of 1767. It in so many words declares it to be "in full force and operation;" and not stopping here, in a distinct enacting clause, declares that "all acts, or parts of acts, which militate against the intent and meaning of this Act, be and the same are hereby repealed." The revival of the Act of '67, and the repeal of all acts militating against the intent and meaning of the Act of December, 1806, is not left to implication, or attained by the application of auxiliary canons of construction. These things are expressly done. This act farther does itself create some exceptions to the general operation of the limitations of the law of '67, among which are not to be found the exceptions created by the act of June, 1806. Now we are constrained to assume that by the act of December, 1806, "the intent and meaning" of the legislature was, so far as personal actions are concerned, to make the Act of '67, and the exceptions contained in the Act of December, 1806, amendatory thereto, the law of the State, excluding all other provisions, laws and parts of laws, militating against that intent. We must believe the legislature had under review all previous legislation upon this subject, and particularly the important provision of June, 1806. If it was the intention of the legislature to retain that Act, they would have excepted it from the sweeping repealing clause of December, 1806. This repealing clause is independent, and relates to all repugnant laws, and must be construed to abrogate every previous act, in conflict with the then meaning and intent of the legislature. If we are right as to what was the intent and meaning of the legislature, then it only remains to inquire whether the Act of June, 1806, does, in fact, militate against that intent and meaning. To test this, it seems to us sufficient to say, that by the Act of June, 1806, giving to plaintiffs the right to renew their suits within six months after the nonsuit or discontinuance of suits commenced within time, such plaintiffs are entitled to a privilege, which they cannot exercise under the Act of '67 and the Act of December, 1806. If the law of June, 1806, is retained, then the law of limitations is essentially different in Georgia from the same law as fixed by the legislature in December, 1806. It does not matter whether that difference is created by addition or alteration; if there be a difference, it militates against the latest declared will of the legislature. In the construction of all these acts, the court has applied the rule as laid down by Lord Mansfield in the case of *Rex vs. Foxdale et al.*, in 1 Burrows 447, to wit: "When there are different statutes '*in pari materia*,' though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system, and explanatory of each other." By this rule it has labored to harmonize the jarring mass of legislation upon this subject, and to retain the act of June, 1806, but has labored in vain; for it does not hesitate to say that that act is necessary to justice, and peculiarly beneficial. The court, not being at liberty to yield to arguments, "*ab inconvenienti*," it being its duty to declare, and not to give, the law, is compelled to yield to the rule, "*Leges posteriores priores contrarias abrogant*," and to hold the act of June, 1806, is repealed.

Judgment of the court below affirmed.

No. 8.—JOHN A. CAMERON et al. vs. The JUSTICES of the Inferior Court of Richmond County, for the use, &c.

Co-Executors and Administrators.

Co-executors and Administrators are, in the eye of the law, considered as but one person, for many purposes: and the acts of one will be considered as the acts of all, in reference to the administration of the assets. But one co-executor or administrator cannot be made chargeable with the *devastavit* of his companion, where he has not, in any manner, contributed thereto.

No recovery can be had upon an administration-bond against the securities, at the suit of a creditor, until a *devastavit* against the administrator is first established according to law. The liability of the securities is an *ultimate* liability, not *primary*.

This was an action of debt upon the administration-bond of Philip H. Mantz and John A. Cameron, administrators of James Leverich, deceased, and others, then securities, alleging a *joint devastavit* by both of the administrators, and was brought by the defendants in error, for the use of Luther Hull, in the Superior court of the county of Richmond, and came up for trial before Judge Gamble, at the January Term, 1846. The defendants in error set forth as their cause of action, two several judgments, one of which had been recovered against Mantz alone, and the other against both of the administrators jointly, upon causes of action existing against their intestate, at the time of his death, from which judgments writs of *fiat facias* had been issued, and returned "*nulla bona*." Upon the trial, the records of these respective recoveries were given in evidence, to prove a *devastavit* by the administrators, so as to charge them and their securities *de bonis propriis*.

Under this state of facts, the plaintiff in error, Cameron, by his counsel, contended that neither he nor the other defendants were liable in this action for the amount of the judgment against Mantz alone, as administrators.

The Judge of the Court below charged the jury that the defendants below (Cameron and the securities), were liable for the amount of said judgment, and a verdict was rendered accordingly. To which charge and decision of the presiding Judge Cameron excepted. And now, in the Supreme Court, the plaintiffs in error, by their counsel, assign as grounds of error, committed on the trial of the cause in the court below,

1st. That there was no legal evidence of the said Cameron having committed a *devastavit* in the administration of the estate of James Leverich.

2d. That neither he nor his securities ought to be held liable to the plaintiffs below, until after a judgment against him as administrator.

A. J. MILLER, for the plaintiffs in error.

One administrator is not liable for the *devastavit* of the other.—*Toller on Exors.* 430; 11 *Johns. Rep.* 16; 2 *Ves. Sen. Rep.* 267. An administrator, or his securities, cannot be made liable, *de bonis propriis*, until after judgment against him, in his representative capacity, and a return of "*nulla bona*" on the execution.—2 *Porter's Rep.* 538. Even supposing one administrator liable for the other, there is no evidence of a joint *devastavit*, as alleged by the plaintiffs below.

WM. T. GOULD for defendants in error.

Administrators, however many, are one person in law.—*Toller*, 37, 243, 359.

Cameron et al. vs. The Justices of the Inferior Court, &c.

One bond is given for both, and each is liable for the acts of the other as *surety*, if in no other way.

The original recovery here, was against one administrator only, though both were sued, one not served: but it made him liable for assets in his hands to be administered. Those assets are not to be found by the sheriff. The administrator then, and his sureties, are liable on the bond. If we cannot recover against all, we can recover against none. The rule contended for would make administrators' bonds valueless; for the absence of one from the State, so that he could not be served with process in an original suit, would prevent all remedy against the other, or the sureties.

By the Court—WARNER, Judge.

This action was instituted, upon an administrator's bond, against Philip Mantz and John A. Cameron, administrators of James Leverich deceased, and their securities, alleging a *joint devastavit* by the administrators. To prove such *joint devastavit*, a judgment was offered in evidence, and admitted in the court below, obtained against Mantz *alone*, as the administrator of Leverich, together with an execution which issued thereon, and a return of *nulla bona*, by the sheriff. The error assigned is, that the court below held this judgment against Mantz *alone* was evidence to authorize a recovery against both defendants and their securities, on their administration bond, for the amount of the judgment. The plaintiffs allege a *joint devastavit* against both administrators. Does a judgment against *one* of them establish the affirmative of the issue? We think not. The allegation is, that the defendants as administrators wasted and eligned the assets of Leverich. The evidence is, that Mantz wasted and eligned such portion thereof as came into his hands; but one executor, or administrator, is not liable for the *devastavit* of his co-executor, or administrator, unless he has contributed, in some way, to the *devastavit* of his companion.—*Toller's law of Executors*, 430; *Douglass vs. Satterlee*, 11 Johns. Rep. 16. It was contended in behalf of the defendants in error, that in the eye of the law, co-executors and administrators are considered as but one person. This position is a correct one for many purposes, and the acts of one will be considered the acts of all, in reference to the administration of the assets; but we think it is well established, both by reason and authority, one co-executor, or administrator, cannot be made chargeable with the *devastavit* of his companions, when he has not, in any manner, contributed thereto. It was also urged on the argument of this case, inasmuch as the suit was on the bond, and all the defendants parties to it, they were all sureties for each other, and the plaintiff was entitled to recover. The answer to this argument is, that the plaintiff was not entitled to recover on the bond, in the court below, until he first established a *devastavit* against the administrators, according to law—and having alleged a *joint devastavit* against both of them, in his declaration, he was bound to *prove* such joint *devastavit* on the trial, which he failed to do. The judgment against Mantz *alone*, with the return of *nulla bona* on the fi. fa. issued thereon, may have been sufficient evidence to charge Mantz with a *devastavit*; but it certainly furnished no evidence of a *devastavit* by Cameron. The liability of the securities to an administrator's bond is not *primary*, it is an *ultimate* liability; and the following cases decide, that suit cannot be maintained on the bond, until a *devastavit* has first been established against the administrator according to law.—*Jones vs. Anderson*, 4 McCord's Rep. 113

Braxton vs. Winslow, &c., 1 *Washington's Virginia Rep.* 31; *Call vs. Ruffin*, 1 *Call's Rep.* 333; *Gordon's Administrators vs. Frederick*, 1 *Munford's Rep.* 1; *Faulk vs. The Judge of the County Court of Monroe*, 2 *Porter's Rep.* 538.

We are therefore of the opinion, the court below committed error, in deciding the plaintiff below was entitled to recover the amount of the judgment rendered against Mantz alone. Let the judgment below be reversed, and a new trial granted.

**No. 9.—THE GEORGIA INSURANCE AND TRUST COMPANY, Plaintiffs
in Error, vs. JAMES S. OLIVER, Defendant in Error.**

The question whether a Garnishee is liable for interest upon the fund in his hands, or the debt owed by him, which is sought to be recovered by process of Garnishment, is not one of strict law, but of discretion, depending upon considerations of equity growing out of the facts and circumstances of the particular case.

When the Garnishee resists the payment of the fund in his hands into court, or controverts his indebtedness, he will be held liable for interest.

It is a general rule, that persons *who are prevented* from paying over money by process of the court, as Summons of Garnishment, Writs of Injunction, and the like, are not liable for interest.

This was an action of Assumpsit tried before Judge Gamble in Richmond Superior Court, January Term, 1846; when the plaintiffs in error, who were defendants in the court below, confessed judgment for ten thousand dollars, with interest from 31st of March, 1845, and costs of suit, subject to the opinion of the court whether they were liable for interest and costs, under the following circumstances: "Prior to the commencement of the suit, the plaintiffs in error had been served with summons of garnishment in a number of attachments issued against the defendant in error, who was plaintiff in this cause in the court below; and that subsequent to the commencement of the suit, like summons of garnishment was served in other attachments." A list of the attachments served, with the time of service, and their amounts, was then set forth in the confession. It is deemed unnecessary to insert them here. Suffice it to say, that the attachments levied anterior to the commencement of the suit, amounted, in the aggregate, to more than the amount of the judgment confessed; to which attachments it was consented that the amount of the confession should be paid in the order in which they were served.

The action against the plaintiffs in error was predicated upon certain Policies of Insurance effected upon merchandise and other property of the defendant in error, in Wetumpka, in the State of Alabama, against loss or loss by fire, and the insured property lost amounted in value more than ten thousand dollars, the aggregate of the policies. Notice of which loss was given the plaintiffs in error immediately.

The suit on the policies was commenced returnable to June Term, 1845, of Richmond Superior Court; at which Term the plaintiffs in error appeared by their attorney, and pleaded "*non assumpsit*," and also a special plea setting forth the facts of the issuing of said attachments against the defendant in error, and of the service of summons of garnishment upon themselves, as above stated, and prayed the judgment of the court whether, &c.

Whereupon the Judge below decided against the plaintiffs in error upon the questions submitted, because they had resisted the payment of defendant's claim under the policies up to the trial Term, upon the ground that it was unjust, notwithstanding they contended that they were prevented from paying under the attachments issued. To which decision of the Judge below, they excepted—

1st. That during the pendency of the attachments against the defendant in error, they should not be liable for interest.

2d. That they ought not to be liable for the costs of the suit, inasmuch as the attachments were a bar to the same while they were pending.

A. J. MILLER, for Plaintiffs in Error.

It is a general rule that a Garnishee shall not be liable for interest, in the absence of fraud, collusion, or neglect to give notice of the attachment to his creditor.—*Sergeant on Attachment*, 108, 166; 2 *Dallas Rep.* 215; 1 *Yeates Rep.* 274; 4 *Mass. Rep.* 170. This case is not within any of the exceptions to the rule—nor does it appear that the Garnishees used the money. They held no money, but were liable on a contract of guaranty. The Garnishments were served before the money became payable; and they could at no time have been safe in paying the money without a judgment being entered against them in favor of the attaching creditor.—1 *Binney's Rep.* 25; 5 *Eng. C. L. Rep.* 160. They ought not to be liable for the costs of the suit, because the attachments being first in point of time, were a bar to the action.

WM. T. GOULD, for Defendant in Error.

Interest, in suits on policies of insurance, is not a matter of right, but depends on the conduct of the parties.—3 *Binn.* 301. It is therefore, in some measure, *discretionary* with the court to allow it, or not. But in this case there is no discretion; for the charter of the plaintiffs in error expressly makes them liable to pay interest, in all cases.—*Prin. Dig.* 410.

In this case the defendants below were not prevented from paying this debt by the attachments levied. They resisted the claim *ab initio*—did not answer the Garnishments—put in a defence in chief, at the first term, and the case, though then in order for trial, by their charter, (*Prin. Dig.* 410), did not go to judgment till the term after.

The presumption is, in the absence of all evidence to the contrary, that they continued to use the money, which was due the plaintiff below. They made interest out of it, and ought to pay interest for it.

The principle upon which interest is stopped, in cases of foreign attachment, is that the party is prevented, *by act of law*, from paying the money to his creditor. It is not his fault that the payment is delayed, for he cannot help it. But where as in the case at bar, he resists the claim, and would not have paid it, even had no attachment been served, the reason for relieving him from interest does not exist. This principle will reconcile all the cases. See 9 *Johns.* 71; 10 *Wend.* 97; 1 *Peters C. C.* 321; 8 *Pickering* 267-8.

By the Court—LUMPKIN, Judge.

The question of interest is not one of strict law, but of discretion, depending upon considerations of equity, growing out of the facts and cir-

cumstances of each particular case.—*Anonymous*, 1 *Johns. Rep.*, 315; *Pease vs. Barber*, 3 *Caines Rep.* 266. In the latter case, Chancellor, then Chief Justice Kent, remarks, "there may be cases in which the defendant ought to refund the principal money only, and there may be other cases in which he ought, *ex æquo et bono*, to refund the principal with interest.

The general proposition contended for by counsel for the company is correct, namely: that persons who are prevented from paying over money, by process of the court, as summons of Garnishment, Writs of Injunction and the like, are not liable for interest.—2 *Yeates*, 280; 9 *Wheat. Rep.* 338; 4 *Halst.* 3; 1 *Peters' Rep.* 524; 2 *Dall. Rep.* 102; 1 *Call Rep.* 115. It would be unreasonable for the law to forbid a thing being done, and then to mulct the party in damages, in the assessment of interest, for not doing it; in other words, for not disobeying its own precept. The law works no such injustice, is chargeable with no such absurdity. Indeed, the whole doctrine of interest is based upon the idea that it is a profit, or premium, properly payable, for the use which one man has of the money of another; or else it is a penalty inflicted for its improper detention. Now, if he cannot pay it, nor employ it, not knowing when he may be called upon by the judgment of the court for its forthcoming, it would be oppressive in the extreme to exact interest. Mr. JEFFERSON, as Secretary of State, put the resistance to the payment of interest, during the war of the Revolution, on our colonial debt, mainly upon the ground that the country, for want of tillage and trade, occasioned by the misconduct of the mother-country, *our creditor*, had produced nothing, and consequently ought not to pay anything.

But how stands the equity of the present case? Has there been no unjustifiable delay—no delinquency in the Insurance and Trust Company? Has it occupied the attitude of an innocent stakeholder of the fund in controversy, ready and waiting to discharge the amount due, whenever it should be directed to do so in behalf of the attaching creditors? And is it fairly to be inferred from the testimony, that the \$10,000 lay idle in its vaults from February, 1845, when the first garnishments were served, up to January, 1846, when there was a confession of judgment for the whole amount of the policies? The fire occurred the last of January, 1845, and the usual notice, it appears, was given immediately thereafter. It is true, they were not compelled by their charter to pay under *ninety* days from the time of furnishing proof of the loss, and interest did not run against them until the expiration of that period; still there was nothing to prevent them from meeting at once their liability.

The history of this transaction, as presented by the record, is this. For certain reasons which appeared satisfactory to the company, no doubt, they early determined to dispute their responsibility. Oliver commences suit on the several policies, to June term of Richmond Superior Court, ensuing the fire. The attachments issuing mostly in the month of April preceding, were returnable to the Inferior, Superior, and Court of Common Pleas. None of the garnishments were ever answered by the company. Had the company insisted on the special plea, filed in bar of the plaintiff's action, to wit, the pendency of the attachments, and been sustained, it would have been forced to depose, either admitting or denying. In the latter event, the affidavits would have been tra-

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versed and a trial had thereon. In these issues, had the company been convicted of the payment of the \$10,000, (and it is presumable that such would have been the finding, from the fact that it was finally admitted to be owing,) interest and cost both would have been recovered. Another and more convenient course seems, however, to have been adopted; that is, to suffer the garnishments to abide the result of the proceeding instituted by Oliver himself against the company. That case under the 8th section of the charter stood for trial at the first term, June, 1845.—Prin. Dig., 410. At that time nothing was done; nearly six months had transpired, and still the company delayed payment on the policies. At the end of another six months it comes forward, and *without contest* acknowledges its indebtedness for the \$10,000, with interest thereon from the 31st of March previously, and *cost* :—*provided* the court, under the circumstances, should hold it liable for interest and cost. Well, what are these circumstances, demands the court below, under which you claim exemption from interest on a contract on which it legally attaches?—2 Hall Rep., 589; 23 Wend. Rep., 525; Prin. Dig., 410. Why, that we were garnished, and *could* not have paid the principal if we *would*. But, replies the judge, that looks very much like an after-thought; you have been strenuously resisting the recovery upon the ground that it was unjust. If you have been honest and in earnest in this matter, there never was a time when you *would* have paid, if you *could*. You could have discharged the demand or most of it, before the bulk of these garnishments were served: you could have answered these summonses almost a year ago, and tendered, or offered to tender the money in court.—3 J. J. Marshall Rep., 68. You could have confessed judgment to the plaintiff six months before you did. To the reverse of all this, you have steadily and perseveringly denied owing him anything, down to the present moment :—interest has been accumulating against him all this while in favor of the attaching creditors. It would be cruel to Oliver to exonerate you from the payment of interest to him, particularly as you have not shown that you have been prejudiced by the garnishments—that you had the money ready, and that it had been rendered unproductive by reason of the garnishments. And as to the cost, resting, like the interest, in the sound discretion of the court, to be awarded upon full view of all the merits of the case, it would seem to be a necessary appendage to the confession of judgment. If the company was wrong in resisting the recovery, and that is admitted by the confession, the liability for cost would follow, of course.—2 Hen. and Munf. 589; 2 Johns. Chan. Rep., 166; 1 Johns. Rep. 555. And this direction as to cost conforms to the usual practice in similar cases.—1 Cox. (S. C.) Cases, 357; 3 Brown's Chancery Reports, 297; Dickens, 291; 6 Ves., 418; 9 Ves., 107. Such was the opinion, in substance, given in the premises, by the circuit judge, in the exercise of the discretion which the law confides to him. It would require a flagrant abuse of that discretion to warrant the interference of this court. On the contrary, we believe that it has been used wisely and well.

In the case of the *Delaware Insurance Company vs. Delaunie*, (3 Bin. Rep. 265,) Tilghman, C. J., says, "Interest in all actions like the present is not a matter of course, but depends on the conduct of the parties. *rr* the defendant has delayed payment improperly he is chargeable wi"

interest." The ultimate and voluntary confession of the company is a virtual and most substantial admission that the payment of these policies was *improperly* delayed from the beginning. The authority proceeds—"If the defendant offers to pay as much as in justice he ought, and the plaintiff refuses to receive it, and brings an action, it would be wrong that the defendant should pay full interest, after being driven to the expense of defending himself against an unjust suit. But in the present case the fault does not seem to lie altogether on either side. The plaintiff insisted on too much, and the defendant offered too little. There was a necessity therefore for a suit. That being the case, and *there being no reason to suppose that the defendant had not made use of the money, we think he should be chargeable with interest.*" How much stronger than this case is the one under consideration? Here the defendants offered to pay nothing; denied for twelve months that there was any liability. The fault is *altogether on their side. There was no necessity for a suit.* Instead of there being no reason to suppose that the defendants had not used the money, there is every reason to suppose that they did, inasmuch as they resisted, and, we are bound to conclude, in good faith, the payment of any portion thereof, upon the ground that they were not liable.

In *Welling vs. Conequa*, (*Pet. C. C. Rep.* 321,) Mr. Justice Washington says, "When an attachment is levied in the hands of a third person, interest is stopped till it is dissolved, because the garnishee, being liable to be called upon at any moment to pay the debt, it is presumed that he had not used it; but when a debtor, who is also a creditor, lays an attachment in his own hands, there is no such necessity existing, and of course no presumption can arise that he had not used the money. If he did use it, it is but just that he should pay interest for it."

Can any presumption, we would ask, arise in favor of a garnishee who has never even answered the summons, and who knows, therefore, that he cannot be called upon to pay the money until the preliminary proceedings are first resorted to, which are in fact definitely postponed by agreement, or suffered to slumber, as we gather from the record, until the suit, at the instance of the principal creditor himself, is tried; against which the garnishee is defending himself, on the merits?

The points involved in this question are elaborately discussed and examined in *Adams et al. vs. Cordis, Trustee, &c.*—8 *Pick. Rep.* 260. There as here, counsel for the *trustee* (corresponding to the garnishee under our law) insisted that interest ought not to be recovered—the fund being *locked up*—by the authority of the law, during the litigation. Chief Justice Parker says, "The first and principal objection to the allowance of interest is, that on the service of the trustee with process, the fund is *locked up* in the hands of the trustee, so that he is prevented by law from paying the debt, and is not at liberty to make any use of the fund; so that the payment of the interest either to the principal defendant, or the attaching creditor, would be oppressive and unjust. The basis of the argument is undoubtedly sound; and if the fact corresponded with the legal supposition, the conclusion would be unavoidable. But if this locking up of the fund is merely a fiction, the trustee in truth making use of it *the matter is in suspense, to allow him the benefit of the principle—adopt the shadow for the substance.* To follow up the *meta-trustee's* counsel, the service of the writ turns the key upon

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the fund, but the trustee keeps the key, unlocks the chest, and takes the money into his own hands. In such case he cannot be allowed to say, "the fund was locked up, and therefore I will pay nothing for it."

Looking at this case, then, on all sides, we are satisfied, that to allow the Insurance and Trust Company to escape from the payment of interest, would be to give a *legal pretext* to perpetrate a wrong upon an injured creditor.

The presumption is, that the service of garnishments stays the property in the hands of the garnishee, and the law considers that it remains in *statu quo*, until ordered to be paid out by the judgment of the court. But here the counsel for the Company distinctly concedes, that the money was not set apart or deposited: for, says he, "*They held no money, but were liable upon a contract of guaranty.*" In other words, this fund never was carried out, but continued mixed with the rest of their business capital. And if so, both reason and authority are decidedly against them. For, by the charter, whatever doubts might have existed at common law, the policy bears interest from a given date, the same as if a promissory note had been executed for the sum, and the interest becomes the debt as much as the principal after that time, and the Company is bound to pay it, unless the use of the money has been actually, and not fictitiously, hindered by legal process.

Let the judgment of the court below be affirmed with cost.

No. 10.—ISAAC S. TUTTLE, plaintiff in error, vs. ROBERT WALTON, defendant in error.

A by-law which asserts a lien on the stock of members of a corporation, for debts due the Company, is, as between the corporators themselves, valid and binding.

A purchaser, under execution at Sheriff's sale, of stock or shares of a corporator, with notice of a lien of the Company upon such stock, under a by-law of the corporation, for the indebtedness of such corporator to the Company, (the lien created by such indebtedness under the by-law, being prior in point of time, to the lien acquired under the judgment,) purchased only such title as was in the corporator, and no other; and, therefore, was not entitled to a transfer of the stock so purchased, under the act of 1822, without first discharging the lien created by the corporator's indebtedness under the by-law.

This was an action on the case, tried in the Superior Court of the county of Richmond, before Judge Gamble, at March Term, 1846; the facts of which are as follows: On the 4th of October, 1840, William Glendenning became the proprietor of twenty-five shares of bank stock of the Augusta Insurance and Banking Company. In the script (the evidence of his ownership) is the following clause: "*Which stock is subject to the payment of all debts due, or to become due, from said stockholder to the said Company, either as principal, security, or otherwise, and is transferable only on the books of the Company.*" The following is one of the by-

laws of the corporation: "No stockholder who may be indebted to the institution, as payer or endorser on any note or notes, laying over and dishonored, shall be permitted to transfer his stock: the Company shall, in that case, be considered a creditor in possession; and such possession, and such dishonored note or notes, shall constitute a lien on the stock, which shall be held subject to the payment of such note or notes."

Glendenning became liable and indebted to the corporation, as endorser of a note for \$3,500, dated January 27, 1842, and payable sixty days after the date, which was duly noted and protested for non-payment, and notice thereof given, and which is still lying over in bank dishonored.

Subsequent to the maturity and dishonor of this note, Isaac S. Tuttle (the plaintiff in error) obtained a judgment against Glendenning in the Inferior Court of Richmond county, and in 1843, caused execution, issued under said judgment, to be levied upon the said twenty-five shares of stock, (which were then, and still continued standing upon the books of said company, in the name of said Glendenning,) agreeably to the provisions of the Act of 1822, entitled "An Act to make bank and other stock subject to execution."^(a) At the sheriff's sale, on the 6th of June, 1843, when the sheriff was proceeding to sell, the Augusta Insurance and Banking Company gave public notice of their lien upon the stock, by virtue of the by-law and script issued in conformity thereto before mentioned, for the payment of the said note. The sale proceeded, and the plaintiff in error (being the plaintiff in execution) became the purchaser, and made a demand upon the defendant in error (who was, and continued to be, the Secretary and Treasurer of said company, and the officer whose duty it was to make transfers and issue script of stock in said company) for a transfer of the shares so purchased, agreeably to the above-recited Act; which transfer was refused. Upon this refusal, the plaintiff in error brought his action on the case in the court below; to which the defendant in error pleaded, *first*, the general issue; and *secondly*, the lien of the company on the shares purchased as aforesaid as herein before set forth; and the notice given at sheriff's sale. The defendant in error confessed judgment, subject to the opinion of the court below, upon his *second* plea, which was admitted to be true in *fact*. The plaintiff's counsel subsequently in the Term aforesaid, in the court below, moved for leave to enter judgment upon the said confession; which was refused—the defendant's said second plea sustained, and the confession set aside. To which decision of the court below, the plaintiff's counsel excepted; and for specification of the errors complained of therein, assigns—

1st. That the court decided that the Act, entitled "An Act to make bank and other stock subject to execution," approved 21st December, 1822, created only a qualified lien on bank stock.

2d. That the court decided that a purchaser at sheriff's sale, under the

(a) "An Act to make Bank and other Stock subject to Execution." (*Approved December 21, 1822.—Dawson's Comp.*)

Sec. 1. "From and after the passing of this Act, the shares or stock owned by any of the banks, or other corporations in this State, shall be subject to be taken for his deputy under execution."

any sheriff or his deputy shall have placed in his hands any execution who owns any stock or shares in any of the banks or corpo-

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Act of 1822, acquired no better title to bank stock, than a voluntary purchaser, anterior to that Act.

3d. That the court decided, that because the purchaser at sheriff's sale had notice of the encumbrances, liens and conditions under which Glendenning held the stock sold, he therefore must take it, as it was held by Glendenning, subject to all the equities and rules of law to which it was subject in his hands.

4th. That the court decided, there was nothing in the by-law pleaded by defendant, repugnant to the laws or constitution of the State of Georgia.

5th. That the court decided, that said by-law was in conformity with the principles of equity and justice—the laws of trade and public policy.

6th. That the court sustained the validity of said by-law.

JENKINS, for Plaintiff in error.

The question at Bar is reduced to a competition between the lien of the plaintiff's judgment against Glendenning, under which he purchased at sheriff's sale, and the lien of the By-law upon which defendant relies. *Per se* the plaintiff's lien is indisputable. But the conflicting lien is prior in point of time, and if of equal dignity must have the preference. What is the character of this lien? Liens arise either by operation of law, or from contract. This lien is not created by statute; is unknown to the common law.—*Angell and Ames on Corporations*, 296.

It is founded in no express contract.

It must be supported, if at all, either by raising an implied pledge, by connecting the By-law with the subsequent endorsement and dishonor of the note set forth in defendant's answer, or by giving to the By-law the force and effect of municipal law. The question is substantially the same. If to raise the implied contract, recourse must be had to the By-law as its foundation, and if that be void, then the implied contract must fall with it.

The true light, however, in which to regard By-laws, is to consider them as acts of legislation, authorized by the charter, or assumed under it. The Legislature did, in fact, give to this corporation by charter a limited legislative power—limited first in

rations of this State, it shall be lawful, and he is hereby required, on application of the plaintiff, his agent, or attorney, to endorse on said execution a levy of the number of shares belonging to the defendant, and after advertising the same agreeably to the law regulating sheriffs' sales, shall thereafter proceed to sell the said shares or stock; provided always, that he shall set up one share at a time, and shall sell no more than is sufficient to satisfy the amount of executions then in his hands."

Sec. 3. "When any constable shall have any execution placed in his hands against any person who is the owner of any shares or stock in any bank or other corporation in this State, it shall be lawful, and he is hereby required, on the application of the plaintiff, his agent or attorney, to endorse a levy on said execution or executions in like manner; and it shall be his duty to make returns of the same to the sheriff of the county in which he lives, which said sheriff shall proceed to sell as pointed out by the second section of this bill."

Sec. 4. "When the sheriff or his deputy shall sell any shares in any bank or other corporation in this State, he shall give a certificate of such sale to the purchaser."

Sec. 5. "The officer of the bank or other corporation, whose duty it may be to make transfers of stock on the books of the bank or other corporation, shall, and he is hereby required to make a transfer of the stock purchased under this act, to the purchaser of the same, upon his, her, or their producing certificate or certificates to the said officer."

Sec. 6. "Any transfer made by the defendant, of his bank or other stock, after judgment obtained against him or her, shall be void: Provided, that notice of the obtaining of such judgment be served on the Cashier of such principal bank, or any of its branches, or the proper officer of such other corporation, within twenty days after said judgment is obtained."

its objects to the internal affairs of the corporation; second, in its subjects to the members of the corporation; thirdly, to a strict conformity to the constitution and laws of the State, and to public policy. If within these limits it is good, otherwise void.

The By-law is intended to accomplish two objects:—

1st. To prevent a voluntary transfer of shares of the capital stock by an indebted corporator.

2d. To create a lien upon such shares for the payment of the debt owed by such corporator.

To the first point we cite 8 Pickering's Rep. 90.

But the By-law may be good for this purpose, yet bad for the second.

No case can be found directly in point, for or against the second proposition. In support of the first, there are authorities.

But for the purpose of distinguishing the two cases, he cited 6 Pickering, 324; 10 Pickering, 454.

We maintain that this By-law is void:

1st. Because it is repugnant to statutes of the State.

2d. Because it affects the rights, and interest of strangers to the Corporation.

3d. Because it is against public policy.

I. It is repugnant to the Judiciary Act of 1799, *Hotchkiss Dig.* 597—8. And to the Act of 1822, (*ante*) which makes "Bank and other stock subject to execution." *Hotchkiss* 604—5. The Act of 1822 settles conclusively that bank shares are personal property, and the legal estate in him who holds the script.

What constitutes repugnancy?

Lexicographers define repugnant to mean, "*contrary to*," "*inconsistent with*."

The repugnancy need not be co-extensive with the operation of the Act; may be total, extending to all cases; or partial—limited to a few.

In each case that may arise, the question *quoad* that case, repugnant *vel non*. Whenever it occurs the By-law must stand still—the statute must have its course. In the case at Bar regular proceedings were had under the statute, until the plaintiff arrived at the point at which the law directed that the defendant should make him a transfer of the shares purchased. This transfer was refused, and the provisions of the By-law assigned as a reason. Then the statute commands that a particular Act be done, and the By-law prohibits the doing of it. Either this is literally true, or the By-law furnishes no defence in the case.

The mandate of the Statute is clear. The defendant's disobedience is confessed, and the court is called upon to decide that the By-law furnishes a full justification for such disobedience.

Then can it be held that the two are not opposed—not contrary, the one to the other—not inconsistent, the one with the other—that the prohibitory By-law is not repugnant to the mandatory Statute?

Suppose that, subsequent to the act of 1822, the General Assembly had passed a general act in relation to banking and other monied corporations, containing the provisions of this By-law—and that this case had arisen under it. The defence must have been successful. But upon what principle would the court have given precedence to the supposed Statute? Upon this only—"Leges posteriores priores contrarias abrogant." The court would have held that these statutes were both of force, but that where they conflicted, where they were *repugnant*, they must give effect to the latest expression of legislative will. Such a decision would proceed upon the ground of repugnancy.

Then is not the repugnancy between the Statute and the By-law equally clear? The very question is, shall the Statute or the By-law govern the case? If the former, the plaintiff's redress is certain—if the latter, the defendant's immunity is equally certain.—1 *Peters C. C. R.* 390; 2 *Green N. J. Rep.* 222.

It may be said there are liens recognized by law, as equivalent to judgment liens. But these are all legal liens, executed or recognized either by statute or common law. There the competition is resolved by comparison of ages. But a lien competing with a judgment lien, must be raised to the platform of law, before the latter can be remitted to the test of time.

The defendant's difficulty is, that the lien he sets up is recognized by no law, common or statutory. The Legislature might have given the company such a lien by action of the charter; for they may by law confer a right, incompatible with pre-existing law. They not having chosen to do so, the corporation can make no such

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enactment, by reason of the express limitation upon their legislative powers contained in the charter which confers them. "They shall make no By-law repugnant to the Constitution or laws of the State."

II. We say this By-law as against the plaintiff is void, because he is a stranger to the corporation. It is a common law principle, that except in cases of local jurisdiction given by Statute, or resulting from prescription, the By-laws of corporations affect only their own internal affairs, and are binding upon their members only.—*Comyns Dig. Title By-law C. 2; Angell and Ames on Corporations*, 301; *Johnson's Rep.* 115.

III. We say this By-law is void, because against public policy.

1st. It generates secret liens.

All the legislation of Georgia is in direct hostility to secret and dormant liens. Mortgages are required to be recorded.—*Hotchkiss*, 420.

Liens of master carpenters and masons upon buildings erected by them are required to be recorded.—*Hotchkiss*, 623-5. Upon the same principle rests all of our legislation relative to dormant judgments. Banks are required to publish annually the names of their stockholders, and the number of shares held by each.—*Hotchkiss*, 360, 1.

This publication gives credit to individual stockholders.

Does the law intend to invite credit by publishing to the world that A B and C are the owners of certain valuable property, and at the same time to delude the public by supporting and sanctioning secret liens upon this property?—7 *Wheaton's Rep.* 46.

Banking institutions are numerous, and their stockholders vastly more so, and many, very many of them, commercial men actively engaged in trade.

If these liens become prevalent great injury must result from them.

2d. Such liens are in restraint of trade. Whilst they improve the credit of stockholders in the particular corporations of which they are members, they impair it with the community at large.

3d. Such By-laws open a door to fraud, by inviting collusion between corporations and their members.

A. J. MILLER, for defendant.

The By-law relied upon by the defendant is valid.—2 *Peere Williams*, 207; 1 *Harrington's Rep.* 27; *Wordsworth on Joint Stock Companies*, 310; 8 *Sergeant & Rawle*, 73, 88; 3 *Porter's Rep.* 321. There is no repugnancy between it and the act of 1823.

The Legislature cannot be supposed to intend authorizing the sale of any more than the defendant's interest in bank stock. Hers the right of the company had attached, before the judgment was obtained. Glendenning could not have transferred the stock; and the plaintiff, especially as he is a purchaser with notice, can have no greater right. Independent of the By-law, the script issued to Glendenning shows the condition upon which he held the stock; and the purchaser at Sheriff's sale must take it subject to the same conditions. The lien of the company is a bar to the plaintiff's action, notwithstanding the title to the shares was in Glendenning.—17 *Sergeant & Rawle*, 285.

The judges not being unanimous in their decision affirming said judgment, delivered their opinions *seriatim* as follows:—

WARNER, Judge.

This case, as exhibited to the court by the record, involves the question, as to the validity of the By-law regulating the transfer of stock, by the stockholders in the Augusta Insurance and Banking Company. By the third section of the act incorporating said Company it is declared, the stockholders in said institution "may make, ordain and establish such by-laws, rules, and regulations, as they may deem expedient and necessary to carry into effect the objects of the institution; provided such by-law"

rules, ordinances, and regulations, be not repugnant to the laws or constitution of this State or the United States." It is contended by the plaintiff in error, the by-law mentioned in the record is repugnant to the laws of this State, particularly to the judiciary act of 1799, and the act of 21st December, 1822, making bank stock subject to execution. I have carefully examined both these acts, and have not been able to discover any repugnance which would make void the by-law in question. The by-law declares, "No stockholder who may be indebted to the institution, as payer or endorser on any note or notes laying over and dishonored, shall be permitted to transfer his stock. The company shall in that case be considered a creditor in possession, and such possession and such dishonored note or notes, shall constitute a *lien* on the stock, which shall be held subject to the payment of such note or notes."

Did the charter of the Augusta Insurance and Banking Company confer the authority on the stockholders to make the by-law, and if so, is it a *reasonable* regulation, expedient and necessary to carry into effect the objects of the institution? By the fourth section of the charter, it is provided the capital stock of the company shall not exceed \$500,000, which shall be divided into shares of \$100. By the sixth section of the charter, the company are authorized to insure property and effects, against loss by fire or water, and all other accidents. By the seventh section of the charter, the company are bound to pay all losses on property or other assurances made by them, within six months after the happening thereof. By the tenth section of the charter the company are authorized to issue bills or notes of credit, payable to bearer, and by the eleventh section of the charter, all bills or notes of credit issued as aforesaid, are to be paid on demand at the company's office. I have referred to the several clauses in the charter for the purpose of showing what were the objects and duties imposed on the company, in order that the expediency or necessity of the by-law, to carry into effect those several objects, might be the more apparent. I am of the opinion, the charter clearly conferred the authority on the company to make the by-law, and that it is not only reasonable, but expedient and highly necessary, to enable them to carry into full effect the objects contemplated by the Legislature. This view of the subject is sustained by authority. Where a charter or statute empowers a corporation to pass such by-laws as are *necessary*, the by-law to be valid need not recite that it was necessary; but the necessity will be implied from the act of passing it, being in fact, synonymous with *expediency*."—*Angell and Ames on Corporations*, 299; *Stuyvesant vs. the Mayor, &c. of New York*; 7 *Cowen's Rep.* 606. The record in this case discloses the fact, there was a by-law made by the stockholders, which prohibited an individual stockholder who was indebted to the Bank, from transferring his stock, and that such indebtedness should constitute a *lien* on his stock for the payment thereof. The record also exhibits William Glendenning as a stockholder in the company,—that on the 4th day of October, 1840, he became the proprietor of twenty-five shares of its capital stock; and in the script, which was the evidence of his ownership, these words were inserted—"Which stock is set to the payment of all debts due, or to become due from said stockholder and company, either as principal, security, or otherwise, and is transcribed on the books of the company." This By-law was obligatory,

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and binding, as between Glendenning and the company—as between him and them it had all the force of a stipulated contract.

“By-laws of a corporation obligate its members, on the ground of their express or implied consent to them; nor is it an objection to a corporator’s being bound by a by-law, that he had no notice of it, or that he was not a member of the corporation at the time the by-law was passed.”—*Angell and Ames on Corporations*, 301; *Stetson vs. Kempton, et al.* 13; *Massachusetts Rep.*, 282. Was this by-law, so far as the rights of Glendenning and the company were concerned to the twenty-five shares of stock, repugnant to any law of the State? If so, what law or principle of public policy does it violate? Being the proprietor of the stock, had he not the right to sell it absolutely, and if so, had he not the right to pledge it, or create a lien upon it, by a bona fide contract, without contravening any public law of the State?

I am now speaking of the validity of the by-law, as between Glendenning and the Company; for if the by-law is repugnant to the constitution and laws of the State, it does not bind Glendenning, and he might treat it as a nullity, in a contest between himself and the Company; but it was not contended on the argument, this by-law was not binding and valid, as between Glendenning and the Company, and I do not doubt its validity—indeed the evidence of his title to the twenty-five shares of stock, recites it to be subject to the payment of all debts due, or to become due, by him to the Company. He became the purchaser of the stock, on the terms and conditions expressed in the by-law, and no other; and as between him and the Company, it was binding and operative, according to its terms and stipulations. The record in this case discloses the further fact, that on the 31st of March, 1842, William Glendenning became indebted to the Company by note in the sum of \$3,500, which was duly noted, and protested for non-payment; and is now, in the language of the by-law, “*laying over and dishonored.*” The indebtedness of Glendenning to the Company is admitted to be a bona fide indebtedness; but it is contended such indebtedness does not create a lien in favor of the Company under the by-law, so as to justify the defendant in refusing to make a transfer of the stock to the plaintiff in error, who is a purchaser at sheriff’s sale under a judgment obtained against Glendenning, *subsequent* to the date of the dishonor of the note mentioned in the record. Assuming the by-law to be valid, as between Glendenning and the Company, the fact of indebtedness on his part being admitted, could Glendenning himself have transferred the stock, and compelled the defendant, as the officer of the Company, to have made a transfer on their books, without first discharging his indebtedness to the Company? Certainly not—and why? Because the by-law of the Company of which he was a member, declares “No Stockholder, who may be indebted to the institution, as payer or endorser, on any note or notes, laying over and dishonored, shall be permitted to transfer his stock; the Company in that case shall be considered a creditor in possession, and such possession, and such dishonored note, or notes, shall constitute a lien on the stock, which shall be subject to the payment of such note or notes.” In the case of *Wain’s Assignees vs. The Bank of North America*, 8 *Sergeant and Rawle* 89, the court say,—“By-laws bind, because the members of the corporation, either individually, or by those who represent them, ar-

supposed to give their assent to them. A contract, express or implied, is the *lien of the parties, and a law to them*; provided it is not repugnant to the charter, or the laws of the land." We have seen the by-law in question was not repugnant to the charter of the Augusta Insurance and Banking Company; and the following cases are authority to show it is not repugnant to the laws of the land.—*Child vs. Hudson's Bay Company*, 2 *Peere Williams*, 207; *Waln's Assignees vs. The Bank of North America* before cited, 8 *Sergeant and Rawle* 73; *McDowell vs. Bank of Wilmington*, 1 *Harrington's Rep.* 27; *Cunningham vs. The Alabama Life Insurance and Trust Company*, 4 *Alabama Rep.* 652. The contract then, as between Glendenning and the Company, as manifested by the law is "*the lien of the parties, and a law to them.*" His indebtedness to the Company as disclosed by the record, created a *lien* upon the twenty-five shares of stock, and the Company is a creditor in possession; the stock being subject to the payment of the dishonored note for \$3,500.

How far a bona fide purchaser from Glendenning of the stock, *without notice of the lien* created by the by-law, would be protected against such lien, it is not now necessary to decide, or how far the insertion of the terms, on which the stock is held by the stockholder, in the certificate of script (the evidence of his title) would go, by way of notice to the purchaser, it is unimportant to discuss at this time. I have endeavored to establish, both on principle and authority, there was a *valid lien* created on the stock, in favor of the Company, as against Glendenning, which would prevent him from transferring it without discharging the same. At what time the plaintiff in error obtained his judgment against Glendenning, the record does not inform us, but it is stated to have been obtained *subsequent* to the dishonor of the note for \$3,500. By the common law, the judgment did not create a *lien* on the stock of Glendenning so as to prevent a transfer of it. By the act of 21st December, 1822, bank stock is made subject to sale under execution, and I concur in the opinion of the presiding judge, in the court below, that the act of 1822 created only a *qualified lien* on bank stock. The 6th section of the act of 1822 declares, "Any transfer made by the defendant of his bank or other stock, after judgment obtained against him or her, shall be void. Provided *notice* of the obtainment of such judgment be served on the cashier of such principal bank, or any of its branches, or the proper officer of such other corporation *within twenty days* after said judgment is obtained." Unless the notice be given within the time prescribed by the act, it would seem the defendant would have the right to transfer his stock, notwithstanding the judgment, and that the lien created by the judgment would not become *absolute* so as to make the transfer void, without the notice being given as required by the statute. The plaintiff in error insists his judgment lien is superior to that of the company created by the indebtedness of Glendenning under the by-law, although the lien in favor of the Company was created, and existing, *prior* to the date of his judgment, under which the sale of the stock to him was made. It is a principle of law applicable to liens of this description, that he who acquires priority in *point of time*, acquires *priority of right*.

The lien of the Company, it is admitted, was prior, in point of time, to the date of the plaintiff's judgment. But suppose it was not—under the facts presented by the record in this case, there being no evidence

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furnished that the plaintiff ever gave the proper officer of the Company notice of having obtained judgment against Glendenning, one of the stockholders, as required by the 6th section of the Act of 1822—would the rendition of the judgment, without the notice, prevent Glendenning from transferring his stock, either absolutely, or creating a valid lien upon it? The Act of 1822, it will be recollected, is in derogation of a common law right, and must be *strictly* construed. It also appears from the record in this case, at the time of the sale of the stock by the sheriff, the bank gave public notice of their lien upon the same, by virtue of the by-law; at which sale the plaintiff became the purchaser, and now contends he is entitled to have the stock transferred to him by defendant, discharged of the lien created by the indebtedness of Glendenning to the Company, through whom he claims title. A purchaser at sheriff's sale purchases such title only as was in the defendant in execution, and no other. If the property purchased is encumbered by a lien, the purchaser takes it *cum onere*; and he has certainly much less equity in his favor, when he purchases the property, as in this case, with a full knowledge of the lien, now urged by the defendant. In the case of *Walns, assignee, vs. The Bank of North America*, the court say—"A stockholder who borrows money of a bank, with full knowledge of an *usage* not to permit a transfer of stock while the holder is indebted to the bank, is bound by such usage, and neither he nor his assignees under a voluntary general assignment, can maintain an action against the bank for refusing to permit his stock to be transferred. The agreement of the stockholders would be equally binding on them, and all who stand in their shoes, as a By-law." In this case there was a *By-law*, as we have seen, expressly prohibiting the stockholder from transferring his stock, while indebted to the bank, and creating a *lien* thereon: and the plaintiff being a purchaser at sheriff's sale, with notice of the *lien*, stands in the shoes of Glendenning—acquired all his rights to the stock, and none other.

It was said in argument, that the stock, standing in the name of Glendenning on the books of the bank, and published to the world as his stock in the bank reports, and the lien created by the By-law being secret, it was contrary to public policy and a fraud upon creditors; that it was the policy of our laws to have secret liens made public, as was apparent from our general Registry Acts. Perhaps it would be a sufficient answer to this argument, to say, the Legislature, in their wisdom, thought proper to confer upon the stockholders of the Augusta Insurance and Banking Company the power of qualified legislation; they have enacted the By-law creating the lien; that lien was not required by either the common or statute law to be made public; and our statutes requiring certain liens to be registered, are in derogation of the common law, and cannot be extended to other liens than those enumerated by *implication*. While, as a legislator, I might be disposed to give my hearty assent to that part of the argument for the plaintiff in error, which so forcibly pointed out the evils to the community by the exercise of the *extraordinary* powers of legislation by Corporations, in the enactment of By-laws; yet as a judicial officer, I feel bound, by the highest considerations of public duty, scrupulously to protect the *vested rights* which have been legitimately acquired under them. Viewing the By-law in question as a *contract* binding on the parties who enacted it, I feel bound to protect the lien r

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the stock created by it. "A lien may exist under agreement, in favor of the general body of proprietors of a bank upon the stock or shares of individual shareholders; but this right is generally reserved, by the express terms of the deed of settlement under which the company or partnership is established. Nor will the *bankruptcy* of the shareholder prevent the operation of the lien upon his shares; where, under such arrangements, the certificates of his ownership are permitted to remain in his possession."—*Cross on Law of Lien*, 318; *Ex parte Plant 4 Deacon and Chitty*, 160. The public interest, in my judgment, will best be promoted by sustaining this By-law of the Company, when we take into consideration the duties and obligations imposed by the charter. By giving the Company a lien on the stock, for debts due by the individual stockholders, it certainly enables them to be the better secured against loss by insolvency, and thereby the better enabled to pay the losses of those who may be insured by them; besides, the *bill-holders*, who are to be looked upon as favorite creditors, will be better protected than they otherwise would be, if the capital stock of the bank was to be appropriated to the payment of the debts of the individual stockholders, in preference to debts due the Company, which, in all probability, were created on the footing of this identical By-law. Suppose the bank unable to redeem its liabilities, (an event which I trust will never happen,) and a bill in equity filed against the Company by the *bill-holders* for the purpose of subjecting the twenty-five shares of stock standing in the name of Glendenning to the payment of their claims, by virtue of the lien acquired by the Company under this By-law; who would have the superior equitable claim to the stock, the bill-holders or the plaintiff in error, claiming as a judgment creditor of an individual stockholder, whose judgment is of younger date than the lien credited in favor of the Company under the By-law? To the extent this By-law strengthens and protects the institution from loss, to just the same extent does it give the ability to discharge its duties to the public, as required by the charter, and prevent *fraudulent* stockholders from injuring the Company or the public creditors of the institution. I am therefore of the opinion, the Act incorporating the Augusta Insurance and Banking Company conferred the authority on the stockholders to make the By-law in question, that the same is not repugnant to the charter, nor the laws of the land, nor is it against public policy, or in restraint of trade; but on the contrary, it is a valid By-law, calculated to promote the interest and objects of the institution, as contemplated by the Legislature. I am also of the opinion, the By-law was binding and operative, as between the stockholders themselves, and the indebtedness of Glendenning, as exhibited by the record in this case, created a valid lien upon his twenty-five shares of stock in favor of the Company. That the lien of the Company created by the indebtedness of Glendenning under the By-law, being *prior* in point of time to the lien acquired by the plaintiff under his judgment, the Company acquired a priority of right. That the plaintiff, who was a purchaser at sheriff's sale, with *notice* of the lien of the Company upon the stock, under the By-law, purchased only such title as was in Glendenning to the twenty-five shares of stock, and no other; consequently, is not entitled to a transfer of the stock at the hands of the defendant, without first discharging the lien created by the indebtedness of Glendenning to the Company, through

whom he derives his title. Let the judgment of the court below be affirmed.

LUMPKIN, Judge, concurring in the affirmance of the judgment below, gave the following opinion :

My opinion in this case is predicated exclusively upon the ground of notice ; and I should be content to concur silently in the *judgment* to be rendered, did not the law make it obligatory on each of us to express his opinion in all cases where we have the misfortune to disagree. As it is, I shall be brief, as my learned brethren on my right and left will assign their reasons at length for the different conclusions to which they have respectively come.

It seems to be admitted on all sides that, as between the corporators themselves, a by-law would be good which asserts a lien on the *stock* of the members for debts due the company. A provision to this effect is frequently contained in the statutes conferring charters, and is a standing by-law in almost all corporations. Tuttle, the plaintiff in error, purchased at sheriff's sale, with full and explicit knowledge of the existence of this lien. Does it lie in his mouth to contest its validity, or to claim exemption from its operation ? I think not. As the judgment creditor and plaintiff in execution, had he discontinued the sale when the notice was given by the bank, and gone into Equity, as it was clearly competent for him to have done, my impression is that he would have been entitled to a decree for a sale unencumbered by the lien, unless notice could have been brought home to him of the *by-law* at the time he contracted with Glendenning ; or, had he, or any one else, bought this stock, publicly or privately, without such notice, *theirs*, I think, would have been the better Equity.

I am aware that *caveat emptor* is the settled rule applicable to all judicial sales. It cannot be otherwise, from the very nature of the transaction, because there is no one to whom recourse can be had for indemnity. No warranty, express or implied, can be raised upon the part of the owner as to whom the proceeding is compulsory, nor of the sheriff, who is the mere ministerial agent of the law, nor of the court, under whose authority the sale is made. Of necessity, therefore, the purchaser takes all risks ; and yet, notwithstanding this doctrine, as now advised, I would compel the bank, under the Act of 1822, to transfer the stock in favor of a bidder who was ignorant of their lien. It would be in vain to tell me that all who attend sheriff's sales should take care and examine into the titles of the property offered in the market. I would, in opposition to any suggestion of this sort, plant myself immovably upon the publication of the corporation itself in the gazettes of the State, proclaiming, *on oath*, semi-annually, to all the world, that Glendenning was the owner of the shares standing in his name.—*Prin. Dig.*, 49 ; *Hotchkiss*, 360, 361. Here would not only be the absence of notice, the fundamental and predominant feature in the whole of our legislation creating liens, as in the cases of mortgagees, mechanics, and the like, but direct and positive notice to the contrary, to wit, that the stockholder was the absolute proprietor of the property ; and with no simultaneous act of the company to put persons upon the look-out or inquiry. I repeat that, under such circumstances, I never could yield my consent to see innocent purchasers and creditors suffer.

Unfortunately for Mr. Tuttle that is not the case which he makes. He comes before us as a mere volunteer in this controversy. The lien of the bank was advertised. Bystanders were notified of the existence of the contract made by Glendenning with his partners, that stockholders who were indebted to the institution should not transfer their stock while the liability lasted, and that the company should be considered as creditor in possession, and that this state of facts should constitute a lien on the stock until the debt was discharged;—that a note of \$3,500, on which Glendenning was the endorser, had been laying over and dishonored since the last of March, 1842, and duly noted and protested for non-payment—a period long prior to the rendition of Tuttle's judgment. And it was farther made known that a clause was inserted in Glendenning's scrip, the evidence of his ownership, that his stock was subject to the payment of all debts due, or to become due, from him to the company, either as principal, security, or otherwise, and that the same was transferable only on the books of the bank. In the face of this notice, Tuttle proceeds with the sale, knowing full well that he was buying property thus encumbered, and with the ground of the adverse claim spread out before his eyes. He grasps the stock, it may be to secure his debt, as *tabula in naufragia*. Thus forewarned, he has not been deceived or ensnared, *whoever else* may be. He takes the stock, *cum onere*, and on that account purchases, necessarily, at a great sacrifice. I do not see that we can help him. This is not a case of *crassa negligentia*, for which there could be no relief. It is worse. It is the case of one who, in the language of Lord Bacon, traffics for what, in Equity, he knows at the time to belong to another.—2 *Chan. Cas.*, 246. I have no hesitation in concluding that the purchase at sheriff's sale, under these circumstances, ought to be adjudged subject to the interest and lien of the corporation; and it were easy to fortify this position, did the occasion require. A vendor's lien for the purchase money of land is not only good against the bargainee and his heirs, *but third persons, likewise, who purchase with notice*.—10 *Yerg.*, 186; 9 *Cowen*, 316; 4 *Black*, 339. Indeed this broad and sensible distinction runs through all the law, in every branch of it.—7 *Watts*, 332; *Powell on Mortgages*, vol. 2, c. 14, 561, 662; *Notes by Coventry—et passim*. The doctrine of the English law of liens is not favored in the American courts, and our Registry Acts are designed to give protection against latent Equities.—14 *Sergt. & Rawle*, 333; 3 *Pick.*, 149; 8 *Greenleaf*, 94.

Profiting as much as my time would permit, since the argument at bar, in searching for authorities, I have been enabled to lay my hands on two cases, bearing directly on the question. And while I cannot concur fully in all the conclusions at which the court arrived in either; still, as they both abundantly sustain my own position, I will advert to them. These adjudications, it is true, are not the law; but, like all others from our sister States, they are the evidence of what the law is. One is the case of the administrator of Spence *vs.* Whitaker and others, decided by the Supreme Court of Alabama.—3 *Port. Rep.* 297. A number of individuals of that State associated themselves together, in 1818, by articles of agreement, under the name of the Courtland Company. The object was to lay off, and sell out, a town, on certain lands they purchased. They divided the stock into one hundred and sixty shares, for each of which a certificate issued.

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By the articles, these certificates were assignable, and the assignee was entitled to all the benefits, and subject to all the conditions and penalties of the original parties. One Tilford being the owner of nineteen shares, deposited the same with one Spence, as collateral security against a heavy responsibility, incurred by Spence for Tilford, who, at the same time, executed a power of attorney to Spence, authorizing him to sell and transfer said stock. In pursuance of this arrangement, thirteen of the shares were sold. The holder called on the agent and manager for the Company, for the dividends due on those shares, who refused to account therefor *until the assignee paid and satisfied a debt due said Company from Tilford*. It was admitted that the purchaser was ignorant of the Company's claim, until long after the transfer, and that, at the formation of the Company, there was no express understanding respecting the lien now set up in its behalf; but that they acted upon consultation with counsel, who advised that it was their legal right.

On the first hearing of the bill, the Chancellor admitted the offset of the Company's debt to go against the thirteen shares; the decree was reversed by the Appellate Court. Chief Justice Saffold, in delivering its opinion, says: "While it must be conceded that the company or trustees had no power to adopt rules which were repugnant to the laws of the land, *yet they had the undoubted right to stipulate such terms, and prescribe such rights, forfeitures and conditions, as were not prohibited by law*; consequently they had a right, while adopting the articles for their government, and issuing the certificate for the stock, to have provided a lien upon them, for debts due the company from the original, or any subsequent, stockholders." And the rejection of their claim is put expressly upon the fact "of their having declined the insertion of any such stipulation, in either instrument;" to wit: the articles, or the certificate. *Here it is incorporated in both*. Again, "the decision," says the Judge, "must materially depend on the terms of the articles of association under which the certificates issued, and the nature and objects thereof. That it was competent for the company, by their articles, to have retained a lien on the certificates, as well as on the lots sold, to secure the debt due them, cannot be questioned. Yet it may be doubted if they could have done so with good faith, without expressing the lien in the certificates, as they did in the title bonds, or *giving it publicity in some other way*." In other words, the comparative rights and equities of the adverse claimants is made to depend, in the opinion of the Chief Justice, upon the question of notice.

The other is the case of Fitzhugh vs. the Bank of Shepherdsville and others, decided by the Court of Appeals of Kentucky.—3 *Monroe's Rep.*, 126. Fitzhugh endorsed a Bill of Exchange to the United States Bank for Thomas J. and Henry H. Roberts. It was protested for nonpayment, and on notice thereof taken up by Fitzhugh. Upon application to the drawers to be re-imbursed, they gave him forty-five shares of stock in the Bank of Shepherdsville. The Messrs. Roberts held the scrip of the Bank for the shares, or a certificate of the number and amount, stating on its face, that the stock was transferable only at Bank personally, or by attorney. Letters of Attorney to the cashier were executed, authorizing him to make the transfer. He refused to do so, alleging as the only reason in behalf of the Bank, that the Messrs. Roberts were then indebted to the

Bank a sum of money due by notes endorsed, and it was understood, when the accommodation was given, the stock was a pledge for the payment, although there was no writing to that effect. Fitzhugh brought his bill against the Bank to compel an assignment of the stock to him, and to account to him for the dividends that had accrued since the transfer. The question was which was entitled to the preference. The court below decided in favor of the Bank, from which an appeal was taken. The judgment was reversed on the ground that the Bank "had no express pledge of the stock." Judge MILLS, who delivered the opinion of the court, says: "Bank stock is an article of commerce, and the certificate of shares is not only the evidence of title, but the evidence of the negotiability of the stock, and must be taken as conclusive evidence against the Bank that the stock is saleable and free of encumbrance. If the Bank wishes to avail itself of such a pledge, it must take from the holder this evidence of title and transferable quality, and *show an express pledge*, otherwise the holder of such evidence might delude and impose upon purchasers, and the *Bank stand as a tacit accomplice in that delusion, and then be permitted* to take from an innocent purchaser the title thus acquired."

I concur heartily in this opinion and the reasoning by which it is supported. Here it will be perceived that there was no evidence of a special pledge of stock. The point was, had the Bank a general lien by law on the stock held in the institution by their debtors, notwithstanding they had issued the scrip, declaring the existence of the stock and its negotiability?

I return then in conclusion, to the point from which I started, and that is, that the fact of the periodical publication of stock under the act of 1832 will likely, when the proper issue is made, over-ride the lien, secured by the by-law and incorporated in the scrip. But so far as Mr. Tuttle is concerned, we are precluded from any such inquiry by the notice given to him on the 6th day of June, 1843, when, as *purchaser*, he for the first time became connected with the transaction, and in which character he is now invoking the aid of the court, to perfect his title by compelling the Bank to transfer the stock.

Whereupon it was adjudged and determined that the judgment of the court below stand affirmed.

NISBET, Judge, *dissenting*.

I have not been able to bring my mind to concur with my associates in the judgment rendered in this cause. This is to me a source of sincere regret. I esteem it a personal misfortune. I have labored to see this question in the light in which they view it, but have been unable to attain to the same conviction. With profound respect for them, and sincere distrust of the justness of my own conclusions, I am constrained to dissent. On the 4th Oct., 1840, William Glendenning became the proprietor of twenty-five shares of the capital stock of the Augusta Insurance and Banking Company; a corporation clothed with insurance and banking powers. He afterwards became endorser upon a note discounted by that Bank for \$3,500, which about the 1st April, 1842, fell due and was protested for nonpayment. Subsequent to the dishonor of this note, Isaac^c Tuttle (the plaintiff in error) obtained judgment in Richmond Inferior Court against Glendenning, and in January, 1843, caused the execution thereon to be levied on the shares of stock owned by him in said

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company, and standing in his name on their books, agreeably to the provisions of the act of 1822, entitled "An Act to make Bank and other stock subject to execution." On 6th June, 1843, when the Sheriff was proceeding to sell, the company gave public notice of their lien upon the stock, by virtue of one of their By-laws, which is in the words following, to wit: "No stockholder, who is indebted to the institution, as payer or endorser on any note or notes laying over and dishonored, shall be permitted to transfer his stock. The company shall in that case be considered a creditor in possession, and such possession, and such dishonored note or notes, shall constitute a lien on the stock, which shall be held subject to the payment of such note or notes." At the sale the plaintiff in execution and the plaintiff in error (Tuttle) became the purchaser of the stock, and having procured the Sheriff's certificate of that fact, made demand upon the defendant in error, (Walton,) who was the secretary and treasurer of said company, charged with the duty of making transfers of the stock, for a transfer of the stock thus brought, agreeably to the act of 1822. Walton refused to make the transfer, whereupon the plaintiff in error brought his action in the court below, to which action the defendant pleaded the lien of the company upon said stock in pursuance of the By law before recited, and the notice of it given at the Sheriff's sale. Upon the trial the defendant confessed judgment, subject to the opinion of the court on the plea of lien and notice, the plea being admitted to be true in fact.

The court below sustained the plea, and the error is alleged to be in that decision. The decision of the court was excepted to on a number of grounds. It is not necessary to state here, much less to advert with any particularity to many of those grounds of error. The questions made by the record are—

1st. Whether the By-Law of the company be valid between Glendenning and the company?

2dly. If valid as between Glendenning and the company, is it valid as between his creditors and the company.

And 3dly. Whether it is valid as between the purchaser at Sheriff's sale under the provisions of the act of 1822, with notice given at the time of sale, and the company.

There doubtless are various ways of stating the points at issue. I think the above form truly states them. It is obvious that the contest here is between the lien of the Bank by virtue of its By-law, and the title of the purchaser of the stock, claiming under a judgment against the owner, in favor of a creditor without notice of that lien. I know of no instance in our State, in which the sustainability of such a lien has been directly adjudicated, as between the Bank and strangers; and no case in the course of the very able argument before this court, has been adduced on either side, wherein that question has been made and decided. In every view of this case, the court is compelled to pass upon the validity of the By-law. The pleadings with marked distinctness present that question. The defendant comes into the court below with the by-law of the company in his hand, and having plead it in bar of the plaintiff's action, demands the judgment of the court. He tenders the issue in behalf of the company. Through him the company sets up this lien,—upon that is the judgment is awarded, upon which error is assigned, and the same

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is still before this court. The defendant in error has had his day in the court below, and now has his day in this court. It is *now* the demand of the plaintiff in error that we pass upon the sufficiency of the defence to his action in the court below. That defence was rested upon the lien created by the By-law, and the existence of that lien depends upon the legality of the By-law. The court below (a court of law) is the only tribunal before which that issue could be made. Certainly the only tribunal to which the plaintiff in error could resort, for the purpose of testing the By-law of the company, was that to which he did resort, and the action which he brought, the proper process. He could not go into a court of equity, because of the remedy open to him at law. This was fully settled by Lord Mansfield, in 2 Burrows, 780, also by Lord Eldon in 17 Vesey, 327. The latter is the case of *Adley*, complainant, *vs.* *The Whitstable Company*. This was a company incorporated by act of Parliament for the purpose of dredging for oysters. According to a By-law, any freeman of the company who should send oysters to market, from any oyster grounds other than the oyster grounds of the company, should forfeit ten pounds, for the use of the company, and if he refused to pay the forfeiture, he should thenceforth be excluded from all share in the profits to be thereafter realized. The complainant becoming obnoxious to the penalty, and also to the disfranchisement, filed his bill, insisting that the By-law was invalid, and demanding that the company account with him for his share of the profits. The Chancellor held that if the By-law was pronounced by a court of law invalid, he would hold the defendants to account, but not until then. "Upon these grounds," said Lord Eldon, "unless I can be satisfied that the party has such a remedy at law as ought to bar his application to a court of equity, I conceive he has a right to apply here for such relief, as under all the circumstances he is entitled to, *provided these By-laws are not valid*, a question which I am unwilling to prejudice, by expressing any opinion upon it; but if a court of law will inform me that this is not a good By-law, even on the state of this record, I shall find means of giving to the plaintiff the benefit resulting from his title in this concern if not forfeited at law under the By-law. The mode of trying that question appears to me to be an *action*, unless some more convenient course can be suggested." The course indicated by Lord Eldon is precisely that taken by the plaintiff in error—an action against that officer of the company, whose duty it is, under the charter, to make transfer of the stock. In the case decided by Lord Eldon, the action, he thought, ought to be against that officer, charged with the payment of the profits of the company. This authority I refer to for the purpose of proving that the validity of the By-law is properly before this court, and that by the pleadings the ultimate question, upon which the rights of these parties turn, is its validity.

Before entering upon the discussion of the prime question thus brought before us, a few preliminary facts and principles may, with propriety, be stated. The objects contemplated in the charter of the *Augusta Insurance and Banking Company* are two-fold, to wit: Insurance and banking.—Prin. Dig. 81, 6th and 10th section of the charter. The power of general insurance and banking conferred upon the same company, I will not say extraordinary in our State, but certainly a very broad grant; the exercise of which should be held strictly within the authority of the charter. Third section of the charter, the stockholders, among other things,

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are clothed with power "to make, ordain, and establish such By-laws, rules and regulations, as they may deem expedient and necessary to carry into effect the objects of the institution, provided such By-laws, rules and regulations, be not repugnant to the laws or constitution of this State or the United States." It is under this clause that the right to make the By-law in question, and before recited, is claimed by the defendant in error.

In relation to private corporations, I remark, they are *limited strictly* to the exercise of those powers which are specifically conferred. The exercise of corporate franchises, being restrictive of individual right, cannot be extended beyond the letter and spirit of the act of incorporation.—4 *Peters*, 168. They can take nothing by implication. When they claim a power, they must show the authority, either in the letter or conclusively ascertained spirit of their charter. And when the exercise of a power and the right of a citizen come in conflict, and the power is doubtful, courts of justice will lean towards the citizen; for sound and sufficient reason—because all corporate powers are in derogation of common right.

This rule is not too stringent; and its equity and policy will be seen at once, by reference to the vast monetary and commercial advantages, which combined capital, associated mind, and concentrated effort, give to the corporation over the citizen.

The common law is jealous of corporate powers. In England, these bodies are held to their charters with unswerving rigidity and ceaseless vigilance. In this country the rule had better be narrowed than enlarged. Whilst I would in no case interfere with the vested rights or conceded franchises of a corporation, no matter how numerous those rights, or how unequal and unjust those franchises, because I believe that all the interests of society would be involved in inextricable embarrassment by such interference; yet, at the same time, I am satisfied that the safety of those interests demands that courts of justice see to it that the rights and franchises claimed are in fact within the grant from the Legislature. The claim of power here is to make a by-law, which creates a lien in derogation, as I believe, of common right. Now, how far has the Legislature conferred upon the Augusta Insurance and Banking Company such a power? It is not contended that the power to create such a lien is expressly given in the charter; if it were so given, the question would be at rest. It is contended that the power is conferred in the grant of power to make by-laws. Now, I hold that this company has under its charter no more power to make by-laws than it would have had without the provision in the charter in relation to them; and farther, that this company has under its charter no more powers to make by-laws than any association of individuals, for commercial or other objects, would have at common law. A power to make by-laws is incident to corporations without any grant.—*Bacon's Abridgment, Title Corporation, D.* Now, what is the restriction imposed at common law upon the power thus incident to corporations? They may make such by-laws as are consistent with their charter, and not repugnant to the laws of the land, and none other.—*Bacon's Abridgment, Title By-Laws, E.* Lord Bacon asserts that it is of the nature and essence of a by-law not to be in contradiction to the laws of the land. "which," says he, "though it may be *præter* the general law of the realm it cannot be *contra*." By adverting to the restrictions upon the pow-

this company to make by-laws, it will be seen that they are just such as the common law imposes. The power to make by-laws is limited to such as "are not repugnant to the laws or constitution of this State or the United States"—in other words, such as are not repugnant to the laws of this realm, the fundamental law, the statute law, and the common law. This corporation stands here, then, just as it would stand in England under the common law; and just as it would stand in this country, without any enactment as to the power to make by-laws. The power of legislating in subordination to the laws of the land, to effect a lawful object, as between themselves, is incident to all associations. The only object which the Legislature could have had in saying anything at all about by-laws in this charter, must have been this; that is, inasmuch as corporations are not creatures of the common law, but exist in this country only by Act of the Legislature, and in England only by Act of Parliament or Letters Patent, to place this corporation, so far as concerns its by-laws, upon the same footing with private associations at common law. It was urged by counsel for defendant in error that the charter extending the power to such by-laws, &c., as the stockholders may deem expedient and necessary to carry into effect the objects of the institution, legalizes all by-laws which they, in their view of what is expedient and necessary, might enact. The answer to this argument is, first, the by-law must not only be expedient, but it must be *necessary*. And is such security for the debts of this company as the by-law provides *necessary* to the object either of insurance or banking? The company might well take risks, and discount paper, without such security. If, indeed, such a by-law is sustained upon the score of its necessity, then, upon the same principle, by-laws which, in their march, tread down all the rights of the citizen, may be sustained. I apprehend that this clause of the charter is to be considered rather as descriptive of the objects about which the company may legislate, than as defining the extent of the legislative power. But, secondly, this clause is certainly subordinate to the proviso of the Act, whose object is to define and limit the power of making by-laws. This proviso is not consistent with that clause, as construed by counsel for defendant in error, but it is consistent with the meaning I put upon it. And in the construction of statutes, it is the duty of the court, if possible, to give effect to all their provisions. I have already stated that the title of the plaintiff in error to the stock of Glendenning is derived under a judgment against him—the stock being brought to sale under the provisions of the Act of 1822, "Entitled an Act to make bank, and other stock, liable to execution." It becomes necessary to look more closely to that Act, in order to exhibit the character of the lien of the judgment, and the rights of the purchaser claiming under it, as contrasted with the lien of the by-law. The first section declares that shares or stock owned by any person in any of the banks, or other corporations, in this State, shall be subject to be sold by the sheriff, or his deputy, under execution. The 2d and 3d sections prescribe the manner of the sale. The 4th section requires the sheriff to give to the purchaser a certificate of the sale. The 5th section makes it the duty of the officer of the bank, whose business it is to make transfers of stock books of the bank, or other corporation, upon presentation of the certificate of sale, to make a transfer of the stock sold to the purchaser. The 6th makes all transfers of stock, by the owner, after judgment

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obtained void, provided notice of the obtainment of the judgment is served on the proper officer of the bank or other corporation. The last section may be dismissed here, as it is considered as having no relevancy to the cause. Before the passage of this Act, bank stock was not liable to levy and sale. Creditors of stock owners were compelled to go into Courts of Equity, to subject the stock, in which court all counter-claims to, and liens upon, it were cognizable. Now it is placed upon the same footing with any other personal property. The Act of 1822 recognizes the owner as holding the entire title, and recognizes the stock, in the hands of the owner, like his slaves, as "prima facie" disencumbered of liens. It directs a sale, and by necessary implication, gives to the purchaser the absolute title, which title, like any other, is liable to be contested by any lien valid in law, and paramount to the lien of the judgment. The Act farther gives to the purchaser the means of procuring the evidence of his title, to wit, a transfer on the books of the company. It commands the bank to make the transfer. The sovereignty of the State speaks in her law, and obedience must follow, unless the bank can show, upon the authority of the same sovereignty, cause for her disobedience. The onus of setting aside the purchaser's title is cast by the law upon the bank. In the cause at this bar, she has taken that onus; first, by refusing to make the transfer, and secondly, by her plea to the plaintiff's action. The lien of the judgment attaches the moment it is open, and binds all the property of the defendant from that time.—*Prin. Dig.* 426, 452. At the time the plaintiff's judgment was rendered, therefore, it created a lien upon all the property which Glendenning held in this stock. It is impossible to escape from the conclusion, that the legislature designed to put bank stock upon the same footing with other personalty. It is true that the purchaser at sheriff's sale gets the title of the defendant, and no more. In this case, what title had the defendant in the stock, at the time judgment was rendered against him? I have shown the entire title, by the Act of 1822, until that title was weakened by a valid lien, or claim, as in any other case of property bought at Sheriff's sale. Now, in opposition to the purchaser's title thus acquired, and as a defence to his action, to make that title available, the defendant sets up what he claims to be an older and valid lien, and asks the decision of the court upon the validity of that lien. What, then, is the issue made? Is it not manifestly an issue made between the lien of the judgment and the lien set up in defence? If the By-law and the lien which it creates are valid, then Glendenning held only the legal estate in the stock encumbered with the lien, and Tuttle got that legal estate and no more. But if the By-law be invalid for any cause, and the lien be in consequence void, as against the judgment lien, then Glendenning held the whole property in the stock, and the purchaser, Tuttle, acquired that and *no less*. These considerations demonstrate that this is no contest between Tuttle merely, as a volunteer purchaser with notice, and the bank. If that were the contest, it would even then be a serious question, under the law and facts of this case, whether he did not acquire a perfect title. But it is not. It is a contest between the judgment lien of a creditor, and the lien set up by the bank, predicated on the By-law and that lien, as I have before said, depends upon the validity of that law. The notice at the sale can avail the bank nothing. If the li

which she then for the first time gave notice, be invalid, it cannot be helped by the notice. If the By-law be bad, it is bad *ab initio*, and is as though it had never been. If it be bad, then the rights of these parties are as though it had never been. This decision, as to its legality, goes back to the first moment of its adoption, and in its return covers and protects all rights which are sought to be affected by it. If the court is called upon to pronounce upon its validity, then I submit whether these conclusions are not irresistible; and that it is so called upon both parties admit—by which I mean to say, that it is not only admitted by counsel in argument, but it is admitted by the pleadings. “Pleading is the formal mode of alleging, on the record, that which would be the support or defence of the party in evidence.”—By Buller J. 3 T. R. 159. I proceed to inquire, having thus defined the position of the question, what kind of lien, if any, is created by this By-law? Liens are either general or particular. A general lien is the right to retain the property of another for a general balance of accounts. A particular lien is the right to retain it, only for a charge on account of labor employed, or expenses bestowed, upon the identical property detained. The latter kind of lien is favored in law, but the former taken most strictly against the party setting it up.—2 Kent. 634; 3 Bos. and Pul. 496; 4 Burrows 2221. These liens are created either by common law, or by usage of trade, or by express agreement of the parties.—4 Burrows, 2221. A lien upon the shares of a stockholder for debts due by him to a corporation, does not exist at common law, nor by usage of trade. When it does exist, it is usually given by statute.—Ang. and Ames, 296. The lien, therefore, of the

- Augusta Insurance and Banking Company, if it has any at all, which I may once for all deny, is a general lien, created by an implied contract between that Institution and Glendenning. The evidence of this contract is found in the By-law, and in the fact that Glendenning took the stock upon the terms prescribed in it. The parties have in this contract themselves declared what kind of lien the bank is to have. And first, it is declared that the stockholder, (Glendenning,) who may be indebted to the institution, as payer or endorser, upon any note or notes, lying over and dishonored, shall not be permitted to transfer his stock; and second, in that case the company shall be considered a creditor in possession, and such possession, and such dishonored note or notes, shall constitute a lien upon the stock, which shall be held subject to the payment of such note or notes.

The lien, then, by the agreement, is that of a *creditor in possession* for a balance of accounts. Again then, our inquiry returns, Have these parties the right at common law, to create such a lien, through the agency of a By-law, thereby excluding creditors, without notice, and purchasers who claim under the lien of their judgments? Is the By-law good or bad, at common law? If it is bad, then there is no agreement, and no lien. I now return, I trust, with a clearer view of the whole ground, to my primary threefold division of the question made by the record; and first, is the By-law valid as between Glendenning and the company, the original parties? It may be conceded that it is. I can see no good reason, why this company may not prescribe terms to the holders of their stock, so long as the terms prescribed affect no rights of the company and the stockholder. Viewed in the light of

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an agreement between the parties, it is good. As between the original parties, the question of lien does not and cannot arise. As the evidence of an agreement between the parties, the By-law is one thing; as the act of the bank, which is the foundation and proof of a lien, it is a very different thing. It may be good for one purpose, and bad for another. It may restrain the voluntary transfer of the stock, and it may appropriate the dividends, and apply the stock itself, to the extinguishment of the stockholder's indebtedness, so long as such appropriation and application do not interfere with the rights of third persons. Thus far, it may be considered as not against the laws of the Realm, as not repugnant to the constitution and laws of the State and of the United States. This position is sustained by authority.—Ang. and Ames 297; 1 Harrington's Del. Rep. 27; 2 Peere Williams 207. It is true, too, that such a By-law as this has been sustained as between the assignees in bankruptcy of the stockholder, and the corporation. It was so adjudged in the case of 2 Peere Williams. This, however, settles nothing as to the rights of third persons, because the assignees of the bankrupt stockholder occupy his place—are subrogated to his rights, and are subject to his contract with the company. They pay no value—are not creditors or purchasers. The question of lien does not arise. In case of the bankruptcy of the stockholder, the question of lien might be made, perhaps, as against both the company and the assignees, by one or more of the creditors. Secondly, Is the by-law valid as between the company and the creditors of Glendenning? In my judgment it is not, and according to the views already given of the character of this issue and circumstances of this cause, it is equally invalid as against a purchaser, who claims, under a creditor's judgment open against Glendenning—that is to say, the lien set up by the bank is not good against the lien of that judgment. I come now to consider, it will be perceived, the By-law as the basis and proof of lien. And before proceeding farther, I remark, that the authorities read by the learned counsel for the defendant in error, do not make this By-law good as between the bank and third persons. In no case read by him, was the contest between the corporation and the creditors of the stockholder. The case read from Peere Williams, which was relied upon with greatest confidence, as I have before stated, was a case between the assignees of a bankrupt stockholder and the corporation. That case was decided, moreover, upon the express ground that the legal interest in all the stock was in the company, who were trustees for all the members. Angell and Ames, commenting upon this case, state this to be the ground of the decision. The Chancellor in delivering the opinion of the court says, "This is a good By-law, for the legal interest in all the stock is in the company, &c." The By-law in the case in Peere Williams, was substantially the same with that in this case. Now, so far from the legal interest in the stock of the Augusta Insurance and Banking Company being in the company, that interest is in the stockholder, and the company are in the character of trustees of the fund paid for it, to be used by them as such for his benefit. The stock stands in his name on the books of the company. This case cannot therefore negative the position which I last assumed.

To make this by-law, and the lien created by it good, notice of the law to the world, and in this case notice to Tuttle, at the time he

credit to Glendenning, was indispensable. Without such notice it is a fraud upon creditors, and void. It is not pretended that there was notice, either actual or constructive. If there had been notice, I do not hesitate to say, that much of the difficulty of this question would be removed. There was no notice. The lien is secret, and this is the radical vice of the whole transaction. For the purpose of encouraging trade, commerce, and the arts, particular liens, such as the liens of artisans, factors, bailiffs, consignees, &c., are favorably regarded by the law, and though secret, are protected. Not so with general liens created by contract. The law does in fact abhor a general secret lien; and to be sustained, it must be founded in the clearest and strongest equity. Modern decisions lean against them. The vendor's lien for the purchase money of real estate, founded in that clear principle of equity, that the vendor is entitled to a just equivalent for his property, is not much favored in the late cases, because it is a secret lien. It has been determined by the Supreme Court of the United States, that the vendor's lien cannot be retained against creditors holding under a *bona fide* mortgage, or conveyance from the vendee, nor against a subsequent purchaser without notice.—7 Wheat. Rep. 46; 3 Gill & Johns. 425; 5 Yerger, 205; 4 Kent, 154.

Chancellor Kent, commenting upon this decision, uses this strong language—"As the *registry of deeds* is the *policy and practice in this country*, I think the decision in Wheaton is correct, and that this *latent equitable lien ought not to prevail* over bona fide purchasers from the vendee, and for valuable consideration, and that they *are not bound to take any notice* of this dormant lien, resting, for its validity, on the state of the accounts between the vendor and his vendee."—4 Kent, 154. n. The opinion is strongly intimated, in this quotation, that the purchaser's title would be good against the vender's lien, even with notice. With what force does not this reasoning apply to the case before this court? Is the lien claimed by the defendant in error within the policy of the rule which recognizes particular liens at Common Law, or the equity of that which allows the vendor's lien? I hope to be able to show that it is not. I say this is a secret lien. How stand the facts? This corporation declare, by a by-law, that they are creditors in possession of Glendenning's stock, and *that* possession, with a future indebtedness, if perchance he may become indebted, shall constitute a lien in their favor. The law is recorded on the books of the company, which books are not open to the inspection of the world, but are carefully hid away in its vaults. There is no publication of it, nor is there any notice of Glendenning's indebtedness. That too is, until long after Tuttle has given him credit, a profound secret. Having legislated themselves into a right adverse to all the world, it is not until Tuttle has become the creditor of Glendenning, and reduced his debt to a judgment, and brought the stock to sale, that they make a revelation of that right. They occupy a position wholly anomalous. They are, in a land of laws, the legislators and administrators of justice. Their by-law and their possession is their lien; and at the same time a judgment to which the general administration must yield obedience. Not only is this at whilst it is true, they *do give notice*, semi-annually, that Glendenning's, in fact, the *owner* of the very stock upon which they claim a the holder of the legal estate encumbered with their equity

but the unqualified owner.—Hotchkiss, 360. That this notice is a requirement of law does not relieve them. Being required to report the names of their stockholders, and the amount of stock owned by each, should, and does constitute a reason why, in good faith to the public, they should give notice also of the encumbrance upon it. Nor is it any answer to say that such publication would be impolitic as to the interest of the bank. As a bank, the law recognizes, in their behalf, no favors nor exemptions but such as are found in their charter. It is a strong legal presumption that it was upon the faith of the ownership of this stock, thus made known, that Tuttle gave credit to Glendenning. *The by-law is therefore a fraud in law upon creditors and purchasers, and void.* I do not mean to say that notice is indispensable to all liens, but that in the circumstances of *this case*, notice is indispensable, and the want of it a fraud upon strangers to the corporation. If it be in law fraudulent, it is repugnant to common right and common law, and of necessity void; and in no stage of these proceedings entitled to the sustaining consideration of courts of justice.

But this by-law, in its terms, creates the lien of a *creditor in possession*, to secure a contingent indebtedness; by which is meant, I suppose, a general balance, which at any time may be found due by the stockholder to the company. Creditors in possession at common law have a lien, under certain circumstances. The facts of this case do not give the company the position of creditors in possession. The lien of creditors in possession arises in cases where property is placed in possession of an individual, or company, upon which labor or expense is to be bestowed by agreement made between the parties, or implied in law. The depository has a lien upon it for his labor and expense. Also, in other cases, when a contract is made or implied, that the property is to be retained to secure a present or continuously recurring indebtedness. Now in this case, at the time of making the by-law, there is no labor to be bestowed *on*, or expense to be incurred *about*, the stock. The lien is not claimed on account of either. Nor is there any present indebtedness, or running account between the parties. It is admitted, that at the time the by-law is made, and at the time Glendenning became a stockholder he owed the company nothing, nor did he become its debtor until about eighteen months afterwards. So that the declaration in the by-law, that the company shall be a creditor in possession, does not in fact make them so. They cannot be, by their own act, remitted to the rights of a creditor in possession. On the contrary, the facts in the case show the by-law to be repugnant to those principles of the common law which recognize the lien of creditors in possession, and is on that account void.—See Montagne on Liens, Titles—Factor, Common Carrier, Banker, Bailee, Attorneys, Ship-builders, &c. Nor can this be looked upon as a *pledge* of the stock, which creates a lien upon it. Pledges may create a lien to secure precedent or contemporary debts, or *existing* debts and *future* advances. But I believe no case can be found of a lien created by pledge without any existing debt, to secure payment of a future debt, which may or may not exist.—See 2 Kent, 576–7, 583. The same doctrine holds, as to mortgages, only with greater strictness. There can be no mortgage without a present indebtedness, or liability on the part of the mortgagor for the mortgagor. And although a mortgage may

good for debts to be contracted as well as for debts due, yet notice of such intent between the parties, has been held necessary.—2 Johns. C. R. 309; 2 Viner's R. 52; 4 Conn. R. 158. According to the Napoleon code a conventional mortgage, (that is, a mortgage created by the act of the parties,) is not valid except so far as the sum for which it is granted is *certain and determined by the act*.—Code Napoleon, 581. No one can fail to have remarked how careful the Legislature of Georgia has always been to require notice of liens created by statute. The policy seems to have been never to create a secret lien, always to maintain the rights of the people, equal under the law. Particularly is it true, that our Legislature has *labored* to keep the rights of creditors equal. This is apparent in our stringent registry laws. Deeds, mortgages, masons' and carpenters' liens are required to be registered.—*Hotchkiss*, 420, 623-4-5. All statutory liens are made public in the publication of the law which creates them. The policy of the Legislature is in accordance with the spirit of the age and the genius of our institutions. There is no element of monopoly or favoritism in our fundamental law. Is there anything in corporations to commend them to special favor? Does any consideration of public convenience require that they should be favored? I think not. And were it necessary, this could be demonstrated. Infinitely stronger is the reasoning in favor of conferring special favors upon individuals. The course which enlightened policy suggests, is that which our legislature has taken,—a stern determination to make the laws of the State equal. Can it, therefore, be presumed that the Legislature meant to confer upon this corporation the power of creating for itself a lien which she has nowhere given to the citizen. The idea seems to me to be unreasonable. The power has been exerted in this By-law. *It is void in my judgment, because it is repugnant to the whole drift and policy of our legislation.*

If this lien is sustained, then the law invites to collusion between the company and stockholder, and patronizes immorality. I need not linger to point out how easily this collusion may be effected, how easy it would be for a dishonest debtor, by the aid of such a By-law, with the co-operation of the company, to cheat his creditors. He is not only an individual, but he is also a corporator—he is, if such a thing can be, *part* of both parties. Interested, as he is, in the corporation, the arrangement inures as well to his benefit as to the benefit of other stockholders. It increases the strength and resources of the company of which he is a member. It has been decided that the By-law of a corporation, whose charter makes the stockholders individually liable for its debts, permitting the stockholder to forfeit his stock to the company, is void, because a fraud upon his creditors. In the case now referred to, the creditors were creditors of the company, and, at the same time, in the event of its insolvency, creditors of the stockholder. The principles involved are like those involved in the case at bar. The contest was between the creditor of the stockholder, (for it was admitted that the company were insolvent,) and the company, as to the validity of a By-law which forfeited to the use of the company his stock. In this case the court declared the By-law void and upon the ground that it was against the fundamental principle of equity, and legally fraudulent.—19 Johns. Rep. 477, 478. An act of 1799, all the property of a defendant against

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whom verdict has been rendered, is bound from the signing of the judgment thereon.—*Hotchkiss*, 597. By the act of 1822, bank stock is made property liable to levy and sale, and upon which a judgment lien attaches. By the same act, the purchaser of bank stock, under that judgment, is entitled to a transfer of the stock upon the books of the Company. The law, as I have before stated, commands the transfer. In this cause, the demand of the transfer was duly made, and the transfer duly refused on account of the by-law of the bank. Here we have the law of 1822 requiring the transfer, and the by-law of the bank prohibiting it. Is the by-law consistent with the act of 1822, or rather, is it not repugnant to it? Both cannot prevail—the two do not harmonize. If they are not in conflict, why this case now before this court? If they are in conflict, which shall yield? Unquestionably the by-law must yield, by the very terms of limitation upon the law-making power, contained in the charter of the company. If, at this point in the proceedings, such direct antagonism existed, does not the antagonism still exist? The plaintiff, *then*, was arrested in the process of asserting his rights, by the interposition of the By-law—so is he now by the defendant's plea, of the lien of the Bank founded upon the By-law. *Then* he could not command the Judgment of a court, to settle this conflict of laws, *now* he can, and that fact constitutes all the difference. This conflict is the more apparent in this, that the act of 1822 is anterior to the charter of the Bank. The charter was passed in the face of the act of '22, and we must presume, with the provisions of that act in the eye of the Legislature. And this fact makes it also easier for me to end the conflict, by sustaining the statute against the by-law. There is therefore a special repugnance between the by-law and the act of '22, and for that reason the former is void.

It has been already stated that no case has been found, directly adjudicating the validity of such a by-law as this, as between the corporation and creditors of the stockholder, or as between the corporation and a purchaser claiming under the judgment of such a creditor. In the absence of direct authority, a doubt expressed by learned jurists as to the validity of such a by-law, ought to be received as influential in settling the question. Such a doubt is stated to exist, by Angell and Ames.—*Angell and Ames*, 297.

The Washington Bank was incorporated by the Legislature of Massachusetts. This corporation made a by-law pledging the stock of every member for any and all sums of money which said member might at any time owe the bank—the same, in substance, with the by-law of the Augusta Insurance and Banking Company. A stockholder having assigned his shares brought suit against the bank for the use of the assignees for dividends due upon the stock. In delivering the opinion of the court, Chief Justice Parker holds this language: "We need not, in order to decide this case, go into the consideration of the validity of this by-law against any creditor of a stockholder, though it may be worth inquiry to the corporation whether such a by-law can be of any avail, except between them and the debtor. We suspect it is a first attempt by a general declaration of this kind to give themselves a preference over other creditors, without taking the usual means of pledge or transfer of the particular stock they intend to hold." This, to my mind, amounts to a solemn affirmation of what is put in the form of a query. Can it be doubt-

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would be the decision of this judge upon such a by-law in a case made before him? There seems to be in the peculiar manner in which he expresses himself a conviction of the invalidity of the by-law; also an anxiety to depart from the necessities of the case before him, so to adjudicate it—6 Pick. 329. This, then, is the opinion of one of the most distinguished lawyers of New England, confirmatory of the opinion I am forced to give, and that is, that this by-law is void as against the title of the stock in the plaintiff in error—that *being void*, there is no lien created by it, and that the decision of the court below ought to be reversed.

No. 11.—JOHN JOHNSON and EDWARD J. BLACK, plaintiffs in error,
vs. NEIL BALLINGALL, defendant in error.

Under the Judiciary Act of 1799, requiring the answer of the defendant to set forth plainly, fully and distinctly the cause of his defence, illegality of consideration cannot be given in evidence, under the plea of the general issue to an action of Assumpsit on a bill of exchange, at the instance of the holder against the drawer and acceptor.

An action of Assumpsit was instituted in Scriven Superior Court, on a bill of exchange drawn by John Johnson in favor of Henry Beaufort upon Edward J. Black, which was accepted, and afterwards transferred to Neil Ballingall. There was a verdict for plaintiff, and appeal entered by the defendants. On the final trial defendants attempted, under the *general issue*, to show illegality in the consideration of the instrument, to wit, that it had been given to compound a felony. The evidence was rejected, under the Judiciary Act of 1799, which requires the defendant to make his defence in writing, which shall plainly, fully and distinctly set forth the cause of defence. To this opinion of the circuit judge the defendants excepted, and the question is now presented for the determination of this court—whether or not there was error committed.

E. J. BLACK for plaintiff in error.

The ground alleged by the plaintiff in error is, that the court, under the plea of the general issue, ruled out testimony to prove the illegality of the consideration, or that the consideration of the bill was the compounding of a felony, prohibited by a statute of the State.

It is a well settled and established principle of law, that the illegality or insufficiency of a contract, by reason of any provision of the Legislature, may be objected, under *non-assumpsit* or *nil debet*, as, that the consideration was founded in gaming or usury, or that the agreement was not reduced to writing, or was not in pursuance of the Statute of Frauds.—1 *Ld. Raym.* 87; *Comyn's Dig. Plead.* (2 *g.*) p. 8.

Pulton Bank vs. Stafford, 2 Wendell's Rep. 483; *Levy vs. Gadsby*, 3 Cranch, 180.

Even a total failure of consideration may be given in evidence, under the general issue; so, if there has been a rescission of the contract.—*Farrow vs. Mayo*, 1 *Nott and Ford Rep.* 312.

Assumpsit, everything which destroys the right of action may be given in evidence under the general issue.—*Bailey et al. vs. Tabor et al.*, 5 *Mass. Rep.* 286;

Auburn vs. Weed, 19 *Johns. Rep.* 300.

On an action upon a note to which non-Assumpsit was pleaded, the defendant may

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prove that it was given for a tract of land, the titles and boundaries of which were misrepresented by the vendor.—*Shelton vs. The Ex. of Garey*, 1 *McCord's Rep.* 470.

From this authority it appears that the courts of Carolina adopt the rule established by the foregoing authorities in Massachusetts and New York, viz., that everything which goes to destroy the right of action may be proved under the general issue.

If the rule applies to evidence of misrepresentation or fraud, it applies with more reason to contracts void *ab initio*. It would be absurd to say that you could go into such evidence under non-Assumpsit, in actions where the contract was merely voidable, and not where it was absolutely void in its inception.

Even usury, under such a plea, can be given in evidence.—*Solomon & Co. vs. Jones et al.*, 1 (*Treadway's*) *Constl. Rep.* 144.

In relation to usury, our Act of 1843 requires it to be pleaded specially with notice, so as to make the defendant a witness where the plaintiff refuses to be sworn and to answer the defendant's interrogatories. This statute, however, is merely cumulative, and does not interfere with the general rule.

The decision of the court below is not sustained by the law or the practice of the courts, and is believed to be the first of the kind ever made in Georgia.

The general issue puts in issue every matter in avoidance of the contract. It totally denies the existence of any cause of action, and therefore puts in issue the legality as well as the consideration, according to the authorities. A consideration is deemed illegal when it is for dropping a criminal prosecution, or suppressing evidence, or soliciting a pardon, or compounding a felony or misdemeanor, or other public crime.—*Wallace vs. Hardacre*, 1 *Campbell's Nisi Prius*, 45; *Nerot vs. Wallace*, 3 *T. Rep.* 17; 7 *T. Rep.* 475; 11 *East Rep.* 46; 16 *East Rep.* 293; *Kinne*, January, 1846, 61.

But it may be contended that if the testimony was admissible it could not avail the defendant, when the bill was in the hands of the plaintiffs as a bona fide holder for a valuable consideration. The answer to this objection is, that a promissory note, or bill of exchange, according to the common law, given for a gambling debt, being void even in the hands of a bona fide holder, so a note or bill, the consideration of which was for compounding a felony, is likewise void.—See *Boyer vs. Bampton*, 2 *Strange Rep.* 1155; *Campbell N. P.* 45; 7 *T. Rep.* 475.

The decisions of the English courts, made upon the statute 9. Ann, c. 14 sect. 1, establish that a bill of exchange, or promissory note given for a gambling debt is void even in the hands of a bona fide holder.—*Chitty on Bills*, 101. Such was the law in relation to usurious contracts, until the enactment of 38 Geo. III. ch. 93, which declares that bona fide holders of negotiable securities, without notice that they were given for usurious consideration, may recover upon them.—*Chitty on Bills*, 892.

A bona fide holder of a bill or note given for compounding a felony has no remedy on it. It being void from the beginning, it can never receive vitality by any act of the parties afterwards.

Wherever the contract is made illegal and void by a provision of the legislature, it is void even in the hands of a bona fide holder. Upon a contract merely voidable, an innocent holder may recover, but not when it is void in its very inception, and when its illegality follows it wherever it may be negotiated.—See 1 *Bay Rep.* 249. The innocent holder cannot even recover on the bill from the payee or maker, or any of the parties to it. He can only recover on the original consideration which he paid for it.

The defendant may insist on illegality of consideration, though some party between him and the defendant took the bill *bona fide*, and gave a valuable consideration for it, and the innocent holder can in such case only resort to the party from whom he received the bill, and then he cannot recover on the bill, but the original consideration.—*Payne vs. Trexevant*, 2 *Bay's Rep.* 23; *Wiggins vs. Bush*, 12 *John. Rep.* 306.

From the foregoing authorities, clearly applicable as they are to the point in issue, the court below has committed an error in ruling out the defendant's testimony, and he is unquestionably entitled to a new trial, with the instructions of this court to admit the testimony.

E. STARNES for defendant in error.

LUMPKIN, Judge, having stated the facts of the case, proceeded as follows:—

Believing, as we do, that this case is controlled entirely by the judiciary act of 1799, we deem it unnecessary to notice the several grounds assumed by counsel for plaintiff in error, or to review the authorities adduced in support of them. The fundamental policy of our legislature, from the beginning, seems to have been to simplify pleadings, and at the same time to promote by them the substantial ends of justice. They have discarded, therefore, alike the diffusiveness and detail of the civil, and the technical accuracy and precision of the common law. Suits are conducted in our courts by *petition* and *answer*, resembling more a proceeding in equity than any other. It is required of the plaintiff that he file his petition in writing—which shall contain the charge, allegation, or demand—plainly, fully, and distinctly set forth; and of the defendant, that he shall, on or before the last day of the term to which the petition is returnable, make his defence or answer in writing, which shall plainly, fully, and distinctly set forth the cause of his defence. And what is the great object sought to be secured by this salutary provision? Is it to pervert or prevent truth, by shrouding it in technical gibberish as has been both ignorantly and rashly charged? Never was folly more fatal than to suppose so. It is to apprise both parties what they will be called upon to meet on the trial, so that being seasonably notified, they may come with all of their proofs prepared for the occasion. It is to enable the jury to know upon what statements of facts they are to predicate their investigation and verdict, and to put it in the power of the court to know upon what issue it shall pronounce its judgment. Would not any relaxation of the law produce surprise, misapprehension, and hopeless confusion? We hesitate not to assert, that trial by jury and the system of pleadings, as heretofore practiced in our State and based as it is upon the very nature of things, will stand or fall together. Courts of admiralty dispense with pleadings, and with them trial by jury also. England made full experiment of the scheme so ingeniously defended by the plaintiff's attorney, and the result has been that among the numerous law reforms introduced of late into that kingdom, the judges have adopted new rules, under the acts of parliament passed for that purpose, wherein they have not only returned to the good old paths, which they had so unfortunately forsaken, but have, to render remedial justice still more perfect, "corrected the abuse of the general issue, by restricting its meaning and application to its original design and effect."—10 *Bing.* 453, 475. In actions on bills of exchange and promissory notes, the plea of *non assumpsit* is no longer admissible in England, but a plea in denial must traverse some particular matter of fact.—*Greenleaf on Ev.* 2 vol. 7. All matters in confession and avoidance, whether going to the original making of the contract, or to its subsequent discharge, must now be specially pleaded.—*Ib.* Such distinctness of information is now considered indispensable, on principles of common justice, in the mother country; and hear the natural result of this return to their "pristine excellence:" These statutes and rules, says Mr. Warren, for the further amendment of the law, and the further amendment of justice, have already exercised a most suasive and benignant influence upon every department of litigation. with reference equally to suitors and practitioners; saving, to the destructive expense and procrastination so long deplored by all; other, simplifying and abridging the drudgery of their labors,

rendering the practice of their profession, in a word, more systematic and scientific than ever.—*Warren's Law Studies*, 14. Shall we *retrograde*, by permitting the defendant, under the plea that he did not promise to pay the bill, to give in evidence proof that it was founded on an illegal consideration; and that, too, against an innocent holder, presumed to be altogether ignorant of the consideration? Would this be fulfilling the reasonable expectations of the venerated framers of our *Judiciary*, in requiring that each party be timely and distinctly informed, by the record of the proposition intended to be maintained by his adversary, at the trial, that he may come prepared to meet it? We think not. Instead of the courts receding, our law-makers should take higher ground in this matter, and require of the plaintiff, as they do in some of our sister States, to file his replication in writing. We are already encountering serious inconvenience for want of this wholesome enactment; and our records stultify us, whenever they are exhibited in foreign courts. An action of debt is brought on a promissory note, barred on the face of it. The statute of limitations is pleaded, and still there appears to be a recovery on the paper. This is inexplicable to strangers, who are uninitiated in the mystery of oral replications. So, to debt on a bond, the defendant pleads a release, to which the plaintiff verbally replies, it was given under duress, and upon this issue succeeds, although not a vestige of it remains on the records. As a court, we should feel ourselves inexcusably culpable, were we to countenance, by our sanction, evils so glaring, any further than we are constrained to do by the law as it is, one jot or tittle of which we will in no wise abate. Much of our present practice is in direct contravention of the *Judiciary*. Our effort and aim will be to uphold and maintain this magnificent monument of legal and juridical wisdom, in all of its length and breadth. Lord Brougham has been greatly eulogized for displaying a reach of intellect in advance of his age, and far beyond his cotemporaries in the reforms which he recommended in the civil and criminal code of his country. Any reader of his speeches will discover that many, yea, most of the plans, which he proposed, were embodied in our judiciary, and had been in practical operation for more than a quarter of a century before. We should be recreant to the highly responsible trust confided to our hands, were we to permit the foundations of this beautiful fabric to be undermined.

It is the opinion of this court, that the decision excepted to is correct and ought to be affirmed, and it is ordered that the same be certified to the court below.

No. 12.—ELEAZER LOCKWOOD, plaintiff in error, *vs.* SEABORN J. SAFFOLD, defendant in error.

The "*eventual condemnation money*," secured by an injunction bond, is the amount *ultimately* fixed, and settled by the judgment or decree of the court in the case.

The final judgment or decree of the court, in the case in which the injunction is sanctioned, affords the only legal evidence of the measure of damages, to be recovered in a suit on the injunction bond.

The defendant in error, in the year 1832, foreclosed two mortgages upon personal property, executed by one Christopher Keenan, and was proceeding to sell the property by virtue of the mortgage *fi. fas.*, when Keenan filed his bill in equity, in Morgan Superior Court, alleging that he had equitable sets off to the amount for which the mortgages had been foreclosed, and praying, among other things, that said *fi. fas.* might be enjoined, until the final hearing of the bill. Lockwood, the plaintiff in error, became the security of Keenan on the injunction bond, given upon the filing of the bill. At March term, 1833, of said court, the matter in controversy between the parties was referred to arbitrators under the following order of court.

"Ordered, that the whole matter in controversy between the parties, including the cases pending in the Inferior Court of this county, be referred to the arbitrament and award of Isaac R. Walton, John Robson, and Isaac Walker, and should there be any amount allowed Christopher Keenan, the complainant, it shall be credited on the *fi. fas.* in favor of defendant, Seaborn J. Saffold, *vs.* Christopher Keenan, complainant, which have been enjoined. It is further ordered that the injunction staying proceedings of said *fi. fas.* be now dissolved, and the sheriff proceed to advertise and sell the property levied on by said *fi. fas.*, subject to said *fi. fas.*, and that the said arbitrators shall make up their award in sixty days from the adjournment of this court, and deliver the same to the clerk of this court, who shall hand a certified copy to the Sheriff, and if their award be in favor of Keenan, the amount awarded shall be allowed by the Sheriff as a credit upon said *fi. fas.* the remainder collected, and the referees select their own day and the place of sitting, and that they give the parties or their attorneys ten days notice of the time and place."

The arbitrators made and returned the following award :

"In accordance to a rule of reference to us directed from the Honorable the Superior Court of said county, at March Term, 1833, we have proceeded to the investigation of the matter in dispute between the parties, and do unanimously award and decree that the two mortgage *fi. fas.* issuing from the Inferior Court of said county, in favor of said Saffold *vs.* Keenan do proceed against the said Keenan; and we do further award and decree to the said Seaborn J. Saffold all the amounts which may be due the late firm of Saffold and Keenan, by note, book account, or otherwise, and one hundred and thirty-nine dollars and seventy-nine cents, amount due by said Keenan to said Saffold, which amount we award and to be entered up against said Keenan on the bill in Equity."

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The sheriff proceeded to sell all the mortgaged property, which failed to bring a sufficient sum to pay off the fi. fas.

The award made and returned by the arbitrators was, at the following term of Morgan Superior Court, made the judgment of the court, and execution was required to issue for the amount awarded, against said Keenan and his security on injunction.

In 1843, Seaborn J. Saffold brought suit against the plaintiff in error, the security on the injunction Bond, for the *eventual condemnation money*, which came on to be heard before Judge MERRIWETHER, at March Term, 1846, of Morgan Superior Court. There was no controversy as to anything contained in the award, or decretal order, except as to the sum which was the difference between the amount of the fi. fas. and the amount for which the property sold, it having been admitted that the balance of the decretal order had been complied with. The court below permitted the award and judgment, together with the mortgage fi. fas. to go to the jury as evidence of *condemnation money*.

The jury upon this evidence found a verdict for Saffold for the sum of \$2,573 23, this sum being the difference between the amount of the fi. fas. and the amount for which the mortgaged property sold.

To the introduction of which testimony as evidence of *condemnation money* the counsel for the defendant below objected, and their objection was overruled by the presiding Judge, to whose decision they have assigned as error in law :

That the said court erred in permitting the record of the proceedings in Equity, and the mortgage fi. fas. to go to the jury as evidence of *condemnation money*.

CONE and REESE for the Plaintiff in Error.

DAWSON and FOSTER for the Defendant.

By the Court—WARNER, Judge.

This was an action instituted on an injunction bond by Saffold, the defendant in error, against Lockwood, the plaintiff in error, as the security for one Christopher Keenan. By the 3d section of the Act of 16th December, 1811, (*Prin. Dig.* 437,) it is declared : " No injunction shall be sanctioned or granted by any judge of the superior courts of this State, until the party requiring the same shall have previously given to the party against whom such injunction is to operate, by application to the clerk of the Superior Court for that purpose, a bond with good and ample security for the eventual condemnation money, together with all further costs." The bond in question was taken in accordance with the requisitions of the above statute. On the trial, the point was made, as to what should constitute the legal evidence of the eventual condemnation money, in a suit on an injunction bond. We are of the opinion " the eventual condemnation money," as contemplated by the legislature, is such only as may be ultimately fixed and settled by the judgment or decree of the court, and that such judgment or decree affords the only legal evidence of the measure of damages to be recovered in a suit on the bond. The Judiciary Act of 1799, providing for appeals, re-

the party appealing to give security for the *eventual condemnation money*, the uniform construction given to the terms, "eventual condemnation money," in that statute, has been, to make the security on appeal, bound for the amount of the judgment rendered, on the appeal trial. Such being the practical construction given to the words of the Judiciary Act of 1799, at the time of the enactment of the statute of 1811, it is quite reasonable to conclude the legislature intended the words "eventual condemnation money," in the latter Act, should receive the same construction as in the former. The term "condemnation" is defined by Bouvier, in his Law Dictionary, 295, to be "a sentence, or judgment, which condemns some one to do, to give, or to pay something; or which declares that his claim or pretensions are unfounded." "Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record."—*3d Bl. Com.*, 395. The "eventual condemnation money," then, is that which the law sentences the party to pay; expressed by the judgment of the court, the legitimate organ of the law. The record in this case shows, the parties submitted the matter in dispute between them to arbitrators, who made an award, which was, in our opinion equivalent to the verdict of a jury. Upon this award, the judgment of the court was pronounced in the following words: "It appearing to the court that a rule of reference was entered into by the parties the last term of this court in this cause, and it further appearing that the arbitrators therein mentioned met in pursuance thereof, who, after due deliberation and investigation of all the matters submitted to them, awarded to the defendant Seaborn J. Saffold the books of accounts, and notes to the late firm of Saffold and Keenan, and the sum of one hundred and thirty-nine dollars in *addition*, which award is now here in court. It is therefore ordered, considered and adjudged, by the court, that said award be now made the judgment of the court, and entered of record accordingly: and that execution do issue for the amount so awarded against the principal and *his security on injunction*." The judgment of the court (the organ of the law) sentences, or *condemns*, if you please, that Keenan should pay to Saffold, in *addition* to the delivery to him of the books of accounts, and notes, the sum of one hundred and twenty-nine dollars, and that execution do issue for the amount so given against the principal and *his security on injunction bond*. From what we have said, it follows, as a legal consequence, this judgment of the court must be taken as the only evidence of the eventual condemnation money in this cause. If we allow ourselves to go behind the judgment for evidence of the eventual condemnation money, where are we to stop? We think the only safe rule is, to be governed by the *judgment alone*, in ascertaining what is the eventual condemnation money in a cause. We are therefore of the opinion the court below erred in permitting the mortgage *fi. fas.* mentioned in the record, to be read in evidence to the jury as evidence of the eventual condemnation money on the trial of this case. The judgment of the court below must therefore be reversed, and a new trial granted.

No. 13.—JOHN H. BROUGHTON, Plaintiff in Error, vs. HENRY BADGETT, Defendant in Error.

A bill of sale to a slave containing Warranty of Soundness is neither at common law, by the Statute of Anne, nor by our own Act of 1799, negotiable by endorsement, so as to vest in the endorsee a right of action on the warranty.

The Act of 1799 makes the papers therein enumerated negotiable "*in such manner and under such restrictions as are prescribed in the case of promissory notes.*" They must be payable to the payee's order or assigns, or to bearer, as prescribed by the Statute of Anne.

Questioned, whether an instrument under seal can be transferred by endorsement not under seal?

A specialty is defined by Littleton to be, "*a bond, bill, or such like instrument; a writing or deed under the hand and seal of the parties.*"

The Act of 1799 has reference exclusively to *liquidated demands*, whether for money or other thing, and applies to these instruments alone, which are for the payment of an ascertained sum of money, or of some specific article or articles of property.

It is not necessary that there should be a recovery upon Broughton in order to entitle him to sue on the warranty.

This was an action of covenant upon warranty of soundness of a slave, tried before Judge Merriwether, in the Superior Court of the county of Greene, at March Term, 1846. The facts of the case are set forth in the opinion delivered by the Superior Court, to which the reader is referred.

JOHN G. McHENRY, for Plaintiff in Error.

The real effect of the decision made by the court below, rejecting the evidence tendered, is that Broughton has no right to maintain the present action—he having assigned his title to the slave named in the bill of sale, as well as all right to maintain an action for a breach of warranty for any unsoundness that may have existed at the time of the first purchase.

1st. We maintain that by Broughton's endorsement to Attaway, of the original bill of sale made by Badgett to him, not even title was conveyed to Attaway. Is the instrument tendered (being under seal) such an one as could be transferred or negotiated at common law? Certainly not. Is any negotiable quality given to such instruments by our Statute of 1799. By reference to that statute, it will be found that bonds, specialties, promissory notes, and other liquidated demands bearing date since 9th of June, 1791, whether for money or other things, shall be of equal dignity, and be negotiable by endorsement, in such manner and under such restrictions as are prescribed in the case of promissory notes.

Clearly, at common law, this being an instrument under seal, cannot be transferred by such assignment as this, not under seal. By our statute referred to, if the instrument be negotiable by endorsement, it must be under the restrictions prescribed in the case of promissory notes. In this instrument there are to be found no words rendering the same negotiable; so the difficulty at common law is not obviated by any of the provisions of our statute.

The effect of the Statute of '99, goes no farther than to vest an equitable title in the transferee, and does not divest Broughton of the legal title. But admitting for the sake of argument, that by the endorsement Broughton conveyed to Attaway his title in the property, does the alienation of title preclude his right to an action for damages on the breach of warranty? Clearly not. No point is more firmly established, than that in cases of this kind, *damages constitute the gist of the action; soundness or unsoundness is the question; and so soon as the warranty is violated, the right to the action for damages accrues, and even when the party has parted with the title to the property.*—1st H. Blackstone, 17; 1 T. R., 136; 2d T. R., 745; 1st Taunt., 368; Wheaton, *Serv. Title Deceit*.

Again, admitting the assignment by Broughton to Attaway of his title in the propert—

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specified in the original bill of sale, does that assignment transfer to Attaway the right to maintain an action, for any breach of the warranty that might occur, made by the original vendor to Broughton? At common law, that being merely a right to bring an action, was not subject matter of assignment. How does it stand by our statute of '99? That statute allows bonds, specialties, promissory notes, and other *liquidated demands* to be negotiated under such restrictions as the statute of Ann prescribes for the negotiating of promissory notes. This statute clearly contemplates *liquidated demands*; instruments given for money or some specific article, for such is the language of the statute itself; and it certainly does not design by the use of the term *specialties*, to admit of the assignments of all instruments which are made under seal, by mere endorsement. If so, deeds to land are likewise subjects matter of negotiability by mere endorsement. Such is not the meaning of the statute; and, clearly, it does not contemplate the rendering the mere right to maintain actions for unliquidated, uncertain demands negotiable by mere endorsement. Besides, this instrument falls under the provisions of the exception affixed to that statute. What is the real meaning and import of the endorsement upon this instrument? It amounts to nothing more than a second bill of sale by the first vendee Broughton, in tenor and effect as that made by the first vendor to him.

In every view of this question, I contend, both at common law, and under our statute of '99, the court erred in rejecting the testimony tendered.

F. H. CONE for Defendant in Error.

W. C. DAWSON in conclusion for Plaintiff in Error.

By the Court—NISBET, Judge.

Badgett, the defendant in error, sold to Broughton, plaintiff in error, a female slave, and executed to him a bill of sale for her, containing a warranty of soundness. The plaintiff in error sold the slave to one Attaway, and endorsed to him the bill of sale which contained the warranty. The bill of sale was under seal, the endorsement was in parol, and in the following words, to wit: "Jan. 25th, 1844, for full value received I hereby transfer the within bill of sale, made by Henry Badgett to me, to Chesley Attaway, test., A. T. Scott, and signed John Broughton."

After the sale of the slave to Attaway, she proving unsound, as was alleged, Broughton brought his action against Badgett on his warranty for damages. In making out his case, the plaintiff tendered in evidence, the bill of sale, with the endorsement. The defendant demurred to the evidence, upon the ground, that the endorsement transferred all right, on the warranty, to Attaway and therefore, Broughton, the plaintiff, could not sue. The demurrer was sustained and the plaintiff submitted to a verdict. Upon this decision the error is assigned. We are therefore called upon to decide whether the bill of sale is itself negotiable, and if it is, whether the endorsement of it to Attaway, gave to him a right of action upon the warranty of Badgett therein contained—which involves the right of Broughton to sue, for it is very clear, that he and his transferee cannot both sue Badgett on his warranty.

The bill of sale being under seal, and the endorsement on it being by parol, if it be a negotiable instrument at all, it may be questioned, whether it can be transferred but by endorsement under seal. We believe that this paper, however, is neither at common law, by the statute of Anne, nor by our own act of 1799, negotiable. The endorsement and delivery of it to Attaway, is evidence of title to the slave, by which Broughton is estopped—by virtue, too, of which Broughton may occupy a relative position to Attaway, which Badgett occupies to him,

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but no right of action on the warranty was thereby transferred—that remains with Broughton. Nor do we believe that it was necessary, that there should be a recovery upon Broughton, in order to entitle him to sue on the warranty. His rights against Badgett remain as they were, and are not affected by the new relations between himself and his vendee. A chose in action is not assignable at common law, so as to vest the legal title in the assignee. The statute of Ann makes only such securities as are payable to the order or assigns of the payee, or to bearer, negotiable. They must have negotiable words on their face, showing the intention of the makers, to give them a transferable quality.—*Story on Bills*, 75 ; 3 *Kent*, 77. This paper contains no negotiable words and is not, therefore, negotiable by the statute of Ann. By the act of 1799 (*Prin. Dig.* 426) the papers which are therein made negotiable are only made negotiable “in such manner and under such restrictions as are prescribed in the case of promissory notes.” One of the restrictions prescribed by the statute of Ann is, that promissory notes must be payable to the payee’s order or assigns, or to bearer. Under this view of the subject, the instrument under review is not negotiable under the act of 1799. But the court gives to that act a construction which upon other grounds wholly denies to this bill of sale and warranty any negotiable qualities. It is of opinion that it was not the intention of the Legislature to include at all, under the provisions of the act of ’99, such an instrument as this. It is argued by counsel for defendant in error, that this paper being under seal is a specialty and is therefore included in the words of the act, “all bonds, and other specialties.” It is not denied but that this paper is a specialty, but it is denied that it is such a specialty as was intended in the words of the statute. A specialty is defined by Littleton, to be “a bond, bill or such like instrument, writing or deed under the hand and seal of the parties.” Here are two kinds of specialties according to the definition, to wit : Bonds and bills and such like instruments, and writings and deeds, both being under seal. The former class obviously includes instruments under seal for the payment of money—the latter, deeds and instruments of like character. The Legislature meant, no doubt, specialties of the former class—to which class this bill of sale does not belong, for it is not a bond or bill or other instrument to pay money—but contains title to a slave and a warranty of her soundness. The warranty assumes to pay nothing ; it gives only a right of action, in which action, recovery is dependent upon proof on trial. It will not be contended that a deed is negotiable by the act of ’99, and yet a deed is a specialty. By “bonds and other specialties and promissory notes and other liquidated demands,” the Legislature manifestly meant “liquidated demands,” and no others. This construction is drawn from the terms of the act, specifying bonds and other specialties and promissory notes, “it enumerated other liquidated demands.” By which it is apparent that the securities previously enumerated, as well as those in these words embraced, are meant to be such as assume to pay an ascertained—*liquidated* sum of money. It is also insisted that the clause in the statute which follows, to wit : “whether for money, or other thing,” is an enlarging clause, and is meant to include all kinds of papers between man and man, which the relations of society may originate. We do not think so, but believe that this clause was designed to give negotiability to notes or bonds for the payment of so—

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specific article of property. At the time the act was passed there was in the country but little money. Commercial operations were limited. The consequence was that much of the business of our State was conducted by an exchange of property; notes were then made payable in the products of the soil—as tobacco, indigo, and cotton. Indeed such notes are not uncommon at this day. To such notes and obligations this clause has reference and gives to them negotiability.

They too are liquidated demands. They are made payable in an ascertained and specific amount of property or produce, and are therefore liquidated. Under no view of the subject can we believe that the legislature meant to make a mere right of action negotiable. Mr. Broughton did not, because if desirous, he could not, endorse to Attaway his right of action on this warranty. We think the judge of the court below erred, and that his decision in this cause must be reversed.

Act of 1799, section XXV., referred to in the foregoing decision, is as follows: "All bonds, and other specialties and promissory notes, and other liquidated demands, bearing date since the 9th day of June, 1791, whether for money or other thing, shall be of equal dignity, and be negotiable by endorsement, in such manner and under such restrictions as are prescribed in the case of promissory notes. *Provided* that nothing herein contained shall prevent the party giving any bond, note, or other writing, from restraining the negotiability thereof, by expressing in the body thereof such intention."—*Prin. Dig.* 426.

No. 14.—JAMES THOMAS, Plaintiff in Error, vs. WILLIAM M. HARDWICK, executor of Darius Gilbert deceased, Defendant in Error.

By the laws of England, as adopted in this State, an administrator *de bonis non* cannot call the representatives of the deceased executor or administrator to account for any property which their testator or intestate may have converted or wasted; nor can he claim or receive anything, but those goods, chattels, and credits, which remain in specie, and are capable of being identified as the property of the first testator or intestate.

Suits for assets wasted or converted, may be brought directly by creditors, legatees, and distributees.

The act of 1821, passed for the better protection of the estates of orphans and for other purposes therein mentioned, does not deprive persons interested of this common law right, but was intended to afford them additional remedies.

The act of 1816 is necessarily restricted to the only class of cases to which it applies.

The act of 1845, to define the rights and powers of administrators *de bonis non*, does not extend to suits brought and prosecuted to judgment before its passage; to make it available in cases instituted since, would it not be necessary for the removed executor or administrator, or representatives of a deceased executor or administrator, to plead and prove that he had fully accounted with the administrator *de bonis non*? (*Quere.*)

An action of debt was commenced by James Thomas against Darius Gilbert, to the February term, 1840, of the Inferior Court of Hancock county. At the August term thereafter, the death of the defendant was

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suggested. At the August term, 1842, William M. Hardwick, as executor of Gilbert, was made a party to the suit, and pleaded *plene administravit prater*. At the February term next ensuing, he confessed judgment to the plaintiff for the amount of his demand with liberty of appeal. An appeal was entered. At the October term, 1843, of the Superior Court, Hardwick pleaded in abatement of the action, that since the last continuance of the cause, his letters testamentary had been revoked, and he removed from his executorship, by the court of ordinary of Hancock County. The plaintiff demurred to the plea. The demurrer was overruled by Judge Sayre, at the April term, 1846, who decided that the case was controlled by the act of 1821, which declares, that upon the revocation of letters testamentary, suits by or against the executor shall not abate by reason of the removal of the executor, but the removal being suggested of record, a *scire facias* may issue to make the successor a party to the suit, at any time after the appointment of the successor, and that the plaintiff was shut in to this course. He further held, that the administrator *de bonis non* had a right to maintain an action against the displaced executor for all the assets which had come into his hands, and that the act of the last General Assembly was only declaratory of this pre-existing right. To this opinion of the circuit judge the plaintiff excepted, and this writ of error is brought to reverse it.

JAMES THOMAS, in propria persona.

I maintain that, at common law, the administrator *de bonis non* can have no action against the executor, Hardwick, for anything administered by him, when the same is not as the testator left it, as when property has been changed into money, or where a waste has been committed.—*Lovell on Wills*, 101; *Curtis vs. Vernon*; 3 T. R. 587; 1 *Williams on Exrs.* 594; 1 *Gill and John*. 270; 5 *Randolph*, 51; 1 *Bar. and Har. Dig.* 552-3-4.

Such suits for assets, wasted or converted, may be brought directly by creditors, legatees or distributees.—5 *Randolph*, 51; *Lovell on Wills*, 392; *Went. off. Exr.* 87.

An executor, having administered, is compelled to undergo the burthen of executor, and also may be sued as executor, though he cannot sue others, because he has not the will under the ordinary seal.—*Ibid.*

But admitting the right of administrator, *de bonis non*, to bring his action against the executor removed for misconduct, yet first at common law, it is the right of a creditor, legatee or distributee to sue the executor so removed, and nothing but a plea of transfer of all the assets, to the administrator *de bonis non*, will discharge him; and, 2d, that after action brought, if removed, this plea will not avail the original executor. To support the first position, see 2 *Williams on Exrs.*, 1196; *Ibid.* 373; *Keble vs. Keble*, *Hob.* 49. To support the 2d position, see *Curtis vs. Vernon*, 3 T. R. 578.

A removal is not a discharge of existing liability.—2 *Bailey's Rep.* 481.

Our statute nowhere declares the action shall abate; it expressly declares it shall not abate. It nowhere declares the plaintiff shall make the administrator *de bonis non* a party; it only declares the plaintiff may make him a party.

Our statute changes the common law, as to plaintiffs, by declaring their actions shall not abate; it gives a right to recover, in the administrator *de bonis non*; it does not change the common law, as to defendants, by absolving them from any fixed liability, but merely gives an additional remedy to plaintiffs, which they did not have at common law, by pursuing the fund, either in the hands of the original executor, or in the hands of the administrator *de bonis non*.

The statute of 1816 can have no bearing on the question, because, 1st, in the language of the statute, it does not embrace the case at bar; 2d, because, if it does embrace the case at bar, in its language or spirit, the act would be, to that extent, unconstitutional, being contrary to the title of the act. The act is "An act to"

rize the several courts of ordinary, in this State, to appoint their clerks administrators, *de bonis non*, in certain causes."

DAWSON and MCHENRY for Defendant.

LUMPKIN, Judge, having stated the facts of the case, proceeded to deliver the opinion of the court.

We are met *in limine* by the assertion of the Circuit Judge—that the Act of 1845, giving by implication to an administrator *de bonis non*, the power to call upon a removed executor or administrator, or the representative of a deceased executor or administrator, to account for assets previously wasted or converted, was only declaratory of a right previously existing. Is this so? We think not. It is needless to go into the history of administrators; suffice it to say that in this State, the power of appointing and superintending the conduct of them is assigned to our Courts of Ordinary; and that we have copied in the main, the statutes of 31 Edw. III., Ch. 2d; and 21 Hen. VIII., Ch. 3d.

An administrator *de bonis non* has not full, complete, and original jurisdiction. He is appointed to finish a business already begun, and in most cases partially performed. He is an administrator *de bonis non administratis*, viz., of the assets not already administered; like all other trustees his authority is derivative, and he cannot transcend his commission. His office, therefore, *ex vitermini*, confers upon him no right to sue for assets which have been previously administered. An administrator *de bonis non* is entitled, says Bacon, (*Title Exs. and Admins. B. 2.*) to all the goods and personal estate, such as terms for years, household goods, &c., which remain *in specie*, and were not administered by the first executor or administrator, as also to all debts due and owing to the first testator or intestate. (*Salk. 306; Skinner, 143; Bos. and Pul. 310.*)

Also it is holden, continues the same authority, that if an executor receives money in right of the testator, and *lays it up by itself*, and dies intestate, that this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects as goods in specie. But if A dies intestate, and his son takes out administration to him and receives part of a debt, being rent arrear to the intestate, and accept a promissory note for the residue, and then dies intestate, this acceptance of the note is such an alteration of the property as vests it in the son, and therefore at his death it *shall go to his administrator, and not to the administrator de bonis non*, (*Barker vs. Talcott, Vernon, 433; 2 Vent. 362; Rol. Ab. 380.*) It would seem, then, that the only question to settle is this. What constitutes an administration of the assets so far as the administrator *de bonis non* is concerned? I annex this qualification to the inquiry, because to *administer*—so far as the administrator *de bonis non* is concerned—is one thing, and to *administer fully*, so far as creditors of the estate are interested, is quite another, and a different thing. And yet we fear that this distinction has been too often overlooked and disregarded, and has given rise to most of the misapprehensions which prevail upon this subject. To *administer goods*, then, is to *alter, change, or convert* them. Where lands and negroes are sold by order of the Court of Ordinary, or perishable property, by the act

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of the party himself, they are *administered* so far as the successor is concerned. He cannot maintain an action for them; of course the predecessor is liable for their proceeds to creditors, legatees and distributees. If an executor or administrator be removed, or die, having on hand *in kind* a portion of the original assets, these could be sued for and recovered by the administrator *de bonis non*. These principles are clearly established by a train of decisions commencing several centuries ago in England, and coming down to our own time in this country, (*Duce vs. Baylie*, *Freem.*, 462; 2 *Lev.*, 100; 1 *Ventr.*, 275; 3 *Reb.*, 298, 427, 463, 495, 549; 3 *Bac.*, 19, 20; 2 *Leigh*, 512, 525; 1 *Gill and John. Rep.*, 270; 9 *Leigh*, 580.)

Suppose the assets of the estate have been exhausted, and misapplied by the payment of debts of inferior degree before those of a superior, will it be pretended that an administrator *de bonis non* could maintain an action against his predecessor, or the estate of such predecessor, for this *devastavit*? Such a precedent or principle is not to be found.

The statute of 30 *Charles II. Ch. 7*, explained and perpetuated by the 4th and 5th of *William and Mary*, expressly declares in its preamble—that executors and administrators of executors and administrators for want of privity, were not before answerable, nor could be sued for debts due by the first testator, or intestate—notwithstanding such executors or administrators had wasted the estate of the first testator or intestate; and, to remedy this evil, it makes such second executors or administrators chargeable. How? To the administrator *de bonis non*? No; but chargeable in the same manner as the first executor or administrator should, or might have been; *that is directly to the creditors.*—*Wernick's admr. vs. McMurdo*, 5 *Ran.*; 1 *Sand*, 219 note E. In the Virginia case from which the foregoing exposition of the British Statutes is quoted, the Court of Appeals boldly challenge the production of a single case—the dictum of a single Judge, or the assertion of any elementary writer—that the administrators *de bonis non*, either at law or in equity, can support an action, or file a bill for account against the representatives of a defaulting executor or administrator. Thus stood then the English law as adopted in this country. Let us see how far the statutes passed by the General Assembly in 1816, 1821 and 1845 have affected the doctrine.

As to the first of these acts, it is enough to say, that the case under consideration does not fall within it. It provides for one class of cases only, and that is where the administrator or administrators die, and the administrator *de bonis non* cannot be granted from the incapability of the persons applying to give the security required by law, or when the persons appointed refuse to give such security. To remedy *this evil* that act was passed. Should a question ever originate under the *second section*, its validity may well be doubted, under that clause in the 17th Section of the first article of the constitution which forbids the passage of any law or ordinance containing any matter different from what is expressed in the title thereof. What was the mischief intended to be redressed by the act of 1821? It fully explains its own object. Doubts had arisen under the previous legislation of the State as to the power of the courts of ordinary to remove executors, administrators and guardians, from their respective trusts, where the authority had not been expressly given, to the injury of the estates of orphans and the delay of justice

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Therefore, *for the better protection of the estates of orphans*, and to prevent the delay of justice, it is enacted, that whenever it shall come to the knowledge of the court of ordinary that any guardian or executor or administrator shall waste, or in any manner mismanage, the estate of any orphan, or deceased person, or does not take due care of the education and maintenance of such orphans, (~~or~~ or "deceased person;" *repeated, of course, by mistake,*) according to his, her or their circumstances; or where such guardian, executor or administrator, or their securities, are likely to become insolvent; or where such executor, administrator or guardian shall fail to make returns within the time prescribed by law, &c.; such guardian, executor or administrator shall be cited to appear, and investigation had of their actings and doings, and the court is empowered to revoke the trust already confided, and pass such further order as it may think fit and expedient. And upon the revocation of such letters testamentary, letters of administration, and guardianship, it is declared that suits by or against either shall not for this cause abate; but the removal being suggested on the record, a *scire facias* may issue to make the successor of such removed person a party, at any time after the appointment and qualification.

In scanning the whole of this Act, would the thought ever occur that it was designed to confer any benefit upon a trustee who had been removed by the proper authority from his office for misconduct? To tolerate such a plea in abatement interposed by him, would be, most emphatically, to allow him to take advantage of his own wrong: *Nemo allegans suam turpitudinem audiendus est*. He is punished by the Ordinary for a breach of the trust confided to him, by the revocation of his letters, and he now seeks to shelter himself under that sentence of condemnation from liability already incurred; and that, too, without pretending by his plea that since his removal he has accounted with his successor for the effects with which he is chargeable. The Act of 1821 was not passed for the protection of delinquent trustees; it did not repeal the common law, but was intended to afford additional remedies, and especially to prevent delay in the pursuit of rights which had already accrued. It is argued that unless the proper representative is made a party to the action pending, no one else would have the means or the inclination to ascertain whether the demand sued upon was proper or not. This is true in all suits against executors *de son tort*, and where the attempt is made, as in the case under discussion, to charge the defendant *personally*, the instinct of self-preservation will be the most satisfactory guaranty against a wrongful recovery. We will not say either how far an administrator *de bonis non* might not make himself a party by *interpleading*, should it be deemed necessary for the protection of the estate.

When an improper administration has been revoked, (and the removal of an executor is strictly analagous,) a creditor may sue the displaced administrator, and he can only defend himself by showing that he has *legally* administered all of the assets, except those delivered over to the succeeding administrator or executor, and if any remain in his hands not delivered over, or if he has committed a devastavit by paying debts of inferior before those of a superior dignity, the creditor will recover.—6 Rep. 18, *b. Packman's case*; 11 Vin. Abr. 119, *pl. 5 admr. of Wernick* *McMurdo*, 83, 84.

which was the law previous to the Act of the General Assembly of

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1845. It is suggested by a gentleman at bar that the passage of this statute was procured to meet a particular case, (not the one before us.) We know nothing to justify such an insinuation. It may have been dictated by the purest patriotism, and with an eye single to the public weal. As it is calculated, however, to delay creditors, legatees, and distributees, by compelling them to wait until the accounts between the administrator *de bonis non* and his predecessor, or the representatives of his predecessor, can be adjusted, at the end perhaps of a protracted litigation; to defeat the successful operations of their just claims, by requiring it to be done through the intervention of one whose interest might, and probably often would, be adverse to theirs and coincident with that of his nominal adversary; to lessen the ultimate security by multiplying the agencies through which the estate is to be settled; and to diminish the assets, by taxing commissions in favor of every successor through whose hands they should pass; we repeat that for these and many other reasons we should construe strictly the Act of 1845, did it become necessary in this case, as it obviously does not. The plaintiff's right of action had accrued previous to its passage against Hardwick, the executor. He had prosecuted his claim to judgment, charging the defendant personally with the debt. It is not in the power of the Legislature, we apprehend, to divest him of a right thus far perfected.

Clearly convinced, then, as we are, that an administrator, *de bonis non*, has no right at common law to call to account the representative of a deceased executor or administrator, for a waste or misapplication of the assets; that the Act of 1816 and 1845 do not embrace the present case; and that the right which the creditor had to proceed against a displaced executor or administrator for the goods wasted or converted, was not taken away by the Act of 1821; but that under it he might still proceed against the executor, or administrator, and reach the fund in his hands, as if his authority had not been revoked; or substitute the administrator, *de bonis non*, at his election; our judgment is that the court below erred in overruling the demurrer to the defendant's plea—especially as the plea does not aver as it should have done—that the defendant had duly administered all of the assets which came to his hands except what he had delivered over to the succeeding administrator. It is ordered, therefore, that the judgment below be reversed, and that the plaintiff in error do recover his cost.

No. 15.—The Justices of the Inferior Court of the county of Morgan as a Court of Ordinary for the use of WILSON WOODS, plaintiff in error, *vs.* WILLIAM WOODS and JOHN VASON, defendants in error.

The Court of Ordinary has no power to discharge a security to a guardian's bond, from a liability which the guardian has already incurred.

In a suit against the discharged security on the guardian's bond, the plaintiff must prove *affirmatively* some *default* or act of *malfeasance* on the part of the guardian, *prior to the discharge of the security*, which in law would constitute a *breach of the bond*. Evidence of the *bare reception* by the guardian of his ward's estate, and nothing more, is insufficient to charge such security.

The discharged security of a guardian is only released from the *future*, not from the *past*, liabilities of his principal. The substituted security is liable, both for the *past* and *future*.

In this action the security pleaded and proved his discharge by the Court of Ordinary. It was therefore incumbent on the plaintiffs to *reply by proof*, some *default* or *malfeasance* on the part of the guardian amounting to a *breach* of the bond; for, although the Judiciary Act of Georgia, of 1799, abolishes special pleading—provides that the declaration and answer shall be sufficient to carry a case to the jury, without any replication or other course of proceedings—yet it does not dispense with the proof required by law on the trial.

This was an action of debt on a guardian's bond, tried before Judge Merriwether, in the Superior Court of the county of Morgan, at March Term, 1846.

On the 5th of December, 1835, the defendant in error, William Woods, was appointed guardian of Wilson Woods and Augustus Woods, orphans of James Woods, deceased, and gave bond with one John Woods and the defendant, John Vason, as his securities. On the 25th of November, 1839, he gave new bond, with John Woods and James Barfield as his securities, as guardian for Wilson Woods, (for whose use the above action was brought on the first bond,) conditioned that he should do and perform all the duties of guardian for the person and property of the said Wilson Woods as the law required, &c.; and was qualified anew in the Court of Ordinary. It appears that the following order was then granted by the Court of Ordinary (to wit) on the 25th of November, 1839:

"On application, William Woods gave new bond and approved security, as guardian of Wilson Woods, and it is ordered that John Vason be discharged from all further liability as security on the bond of William Woods as guardian of Wilson Woods and Augustus Woods."

William Woods, the guardian, and his securities on the second bond, become insolvent; John Woods died insolvent, and there being no representative to him, the suit was brought against the defendants in error, alleging a general breach of the conditions of the bond.

The defendant pleaded, specially, the giving of the new bond on the 25th of November, 1839, and the discharge of Vason by the Court of Ordinary from further liability as security on the first bond, (the subject of the suit,) in bar of the plaintiff's action.

The trial proceeded, and the counsel for plaintiffs after introducing the *id.*, and an exemplification from the Court of Ordinary, exhibiting a

return made by William Woods, as guardian of Augustus Woods and Wilson Woods, acknowledging the receipt by him of \$2,795 12 on the 25th of December, 1837, closed their case.

The defendants in error then tendered in evidence, in support of their defence, the new bond, and the records of the Court of Ordinary aforesaid of the discharge of the defendant Vason. To all which the plaintiff's counsel demurred, on the ground that the evidence tendered furnished no legal bar to the plaintiff's right to recover; whereupon the court below overruled the demurrer and admitted the evidence, deciding that the same was a bar to the plaintiff's right to recover, for the following reasons:

1st. Because the records of the Court of Ordinary, when taken together, did not show that Woods' guardian had ever been removed by the court, either on his own application, or that of his securities.

2d. That a fair interpretation of the record showed that new securities only had been given.

3d. That by the execution of the new bond by the securities, and the acceptance of it by the Court of Ordinary, the securities on the former bond were discharged, and the latter securities were alone liable.

To which decision in the court below, and the reasons given therefor, the plaintiffs in error excepted, and have assigned for error,

1st. The court below erred in permitting the exemplification of the record from the Court of Ordinary, offered in evidence by the defendants, to go to the jury, because the same contained no evidence, that the defendant Vason was ever legally discharged from his liability on said bond, on which the action was brought, inasmuch as no petition was ever exhibited to said Court of Ordinary, and no citation ever issued in terms of the law, previous to the passing of said order, discharging the defendant Vason from further liability.

2d. Admitting that the order of the Court of Ordinary, and the giving of the new bond, did discharge the defendant Vason from further or future liability, the court below erred in deciding that it discharged him from his liability for funds, that the defendant Woods, had received as guardian, previous to the passing of said order, and previous to the execution of the second bond.

3d. The court below erred in deciding that by the execution of the new bond by the defendant Woods and his securities, and the acceptance of it by the Court of Ordinary, the securities to the first bond were discharged from all liability whatever; and that the securities on the last bond were alone liable for the acts of the defendant Woods, from the commencement of the guardianship:—

4th. The court below erred in deciding that the order of the Court of Ordinary, discharging the defendant, Vason, from further liability, discharged him from any liability at all, either past or future.

5th. The court below erred in deciding that it was within the power of the Court of Ordinary to discharge the defendant, Vason, from liabilities he had incurred as security for Woods as guardian, previous to the passing of said order of discharge.

F. H. CONE, for plaintiff in error.

The discharge of Vason, it is presumed, took place under the provisions of the act

of the Legislature, although there is no evidence that any petition was made, or citation issued.—*Prin. Dig.* 228, 232, 237, 241, 245; *Hotchkiss*, 471. It does not appear from the records of the Court of Ordinary under what provisions of these statutes the new bond was taken.

The plaintiffs in error contend, that the taking of the new bond did not discharge the securities to the first bond, for any moneys then in the guardian's hands.—*Shelton vs. Cureton*, 3 *McCord's Rep.* 417; *Trimmer vs. Trail*, 2 *Bailey's Rep.* 480; *Waterman vs. Bigham and Hudson*, 2 *Hill's Law Rep.* 512; 1 *Bailey*, 334; *Field vs. Pelot*, 1 *McMullan's Rep. in Equity*, 370-1; *Richards. Law Rep.* 507; 6 *Randolph Rep.* 444; 1 *Brockenbrough Rep.* 256; 9 *Wheaton*, 720; 12 *ib.* 505.

The Legislature could not authorize the court to discharge the securities from a liability already incurred. It would impair the obligation of a contract.—4 *Wheaton*, 518; 6 *ib.* 131; 3 *Mason C. C. Rep.* 88.

DAWSON, REESE, and FOSTER, for defendants in error.

By the Court—WARNER, Judge.

This action was instituted on a guardian's bond, executed by William Woods as principal, and John Vason as security, containing the following condition: "Whereas, the said William Woods is this day appointed guardian of Wilson Woods and Augustus Woods, orphans of James Woods, deceased: now if the said William Woods do well and truly perform and demean himself as guardian as aforesaid agreeably to letters of guardianship bearing even date herewith and agreeable to law in such cases made and provided, then this obligation to be void, otherwise to remain in full force and virtue in law."

This action is brought for the use of Wilson Woods alone—the questions involved in this case are important, not only to the defendant, but to the community at large; and we have given them that consideration, which their importance would seem to demand. The guardian's bond to which Vason became security, was executed on the 5th of December, 1835. On the 25th of December, 1837, William Woods, the guardian, charges himself in his return to the Court of Ordinary, with the reception of money belonging to his wards, to the amount of 2,795 12. On the 25th November, 1839, John Vason was discharged from his securityship on the first bond, and a new bond given, with John Woods and James Barfield, securities. It also appears from the record in this case, that William Woods, the guardian, and his securities on the second bond, are *insolvent*. The first ground of error assigned by the plaintiff, as to the fact of there being no petition, and citation to the Court of Ordinary, for the discharge of Vason, the security, prior to the granting the order of discharge, was virtually abandoned by the plaintiff's counsel in the argument, and, we think, properly abandoned; therefore, it is not necessary for us now to consider it. The rights and liabilities of the respective parties, growing out of the discharge of Vason, the security, by the Court of Ordinary is the great question in this case, and one which we are free to admit is altogether clear of difficulty.

Anxious, however, to establish a rule of decision for our future guidance in all similar cases, we have carefully examined the general principles of the common law, as well as the decisions of the courts in a sister State, where there is a statute, similar to our own, providing for the discharge of securities to administrators and guardian's bonds.

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The Act of 1805 (*Prin. Dig.* 237) provides, "Whenever securities for executors, administrators, or guardians, conceive themselves in danger of suffering thereby, and petition the Court of Ordinary for relief, the said court shall cause the executor, administrator, or guardian, to be summoned to appear before them at the next sitting thereof, and shall make such order, and give such relief in the case, by counter security or otherwise, as, to the said court, *shall seem just and equitable*. The clause of the Act, under which the Ordinary in South Carolina exercises the power of discharging securities as stated by the court, in *Trimmier vs. Trail*, 2 *Bailey's Rep.* 486, is as follows:—"If the securities for administrators conceive themselves in danger of being injured by such suretyship, they may petition the court to whom they stand bound, for relief; which court shall summon the administrator to appear, and thereupon make such order or decree as shall be sufficient to give relief to the petitioner." On the argument of this case, it was insisted by the counsel for the defendant in error, that the discharge by the Court of Ordinary, and the substitution of new securities to the guardian's bond, released Vason, the discharged security, from all liability whatever, both *past* and future. The order granted by the Court of Ordinary, only discharges Vason from *further* liability as security on the guardian's bond: "It is ordered by the court, that John Vason be discharged from all *further* liability as security on the bond of Wm. Woods, as guardian of Wilson Woods and Augustus Woods." The security, Vason, is liable on his *contract*, the terms of which are stipulated in the bond executed by him. If Woods, the guardian, "do well and truly perform and demean himself as guardian, agreeable to law, in such cases made and provided, then this obligation to be void, otherwise to remain in full force,"—constitutes the *liability* and extent of Vason's undertaking. But suppose the guardian does not perform his duties according to law, fails to collect the effects of his ward, whereby they are lost or having collected them, wastes the same during the time of the first security, would not the security be liable therefor, according to the terms of his bond? Would not the ward, for whose use and protection the bond was taken, have a *vested right*, under the contract, to recover on it, for any damages sustained by him, for a breach thereof by the guardian, *prior* to the discharge of the security? Has the Court of Ordinary the power, under the Constitution, or would the Legislature have the power to release the security from a liability already incurred, by a breach of the contract, without manifestly *impairing the obligation of such contract*? We think not, and in this view of the question we are sustained by authority. In the case of *Cureton vs. Shelton*, (3d *McCord's Rep.* 417,) the court, after reciting the fact, that a decree had been made against the administrator establishing his default, *prior* to the discharge of the security, remark,—"*These were all liabilities which attached, at the time of the discharge. Now admitting that the discharge could operate as to future liabilities, it cannot affect those which did exist; there is no power which could release the securities from such.*"

In *Trimmier vs. Trail*, (2 *Bailey's Rep.* 486,) the court say—"The act under which the Ordinary is to give relief to the securities, clearly contemplates a discharge from a *future* and not from a *past* liability." This last case fully sustains the decision of the court in *Cureton vs. Shelton*. We are therefore of the opinion, the court below committed error.

in deciding the discharge of Vason by the Court of Ordinary, and the substitution of new securities to the guardian's bond, discharged him from all liability, both *past* and future; his discharge could only operate as to future liabilities.—See *Ordinary vs. Bigham and Hudson*, 2d Hill's S. C. Rep. 512. We are also of the opinion, the substituted securities on a guardian's bond are bound for all the liabilities of the guardian, both past and future. In such a case the security would be considered as *cumulative*. *Trimmier vs. Trail*, 2 Bailey's Rep. 496; *Ordinary vs. Bigham and Hudson*, 2d Hill's S. C. Rep. 512.

It was insisted on the argument by the counsel for plaintiff in error, notwithstanding Vason the security was discharged by the Court of Ordinary, the reception by the guardian of the sum of \$2,795 12, (the money of his ward,) *anterior* to his discharge, was sufficient evidence to authorize a recovery against the discharged security: it having been proved on the trial, the guardian and his second securities were *insolvent*. It was said, the return by the guardian to the Court of Ordinary of that amount of money in his hands, and allowed by the judgment of that court, was equivalent to a decree he was indebted that amount to his wards. Although we hold the Court of Ordinary could not discharge the security from a *past* liability, yet, we are clearly of the opinion, it is incumbent on the plaintiff to show *affirmatively* such liability had been incurred by the guardian, prior to the discharge of the security, when he seeks to make such security liable on his bond. The burden of proof is on the plaintiff, to show waste or some act of maladministration on the part of the guardian *anterior* to the discharge of the security, in order to make the latter liable in law. The bare reception of the money by the guardian, prior to the discharge of the security, is not evidence of either waste or maladministration by the guardian.

The law makes it the duty of the guardian, to reduce into his possession the money and effects of his ward, and control the same until he arrives of age. Indeed, it would be a *breach* of his bond, if the guardian should fail to use lawful diligence to acquire the possession of his ward's effects, after his appointment; and surely, the doing of that which the law enjoins upon him as a duty, cannot be considered as a *breach* of his obligation, given to secure the performance of such duty. The view we have taken of this subject is supported both by principle and authority. "It is presumed, till the contrary is proven, that every man obeys the mandates of the law, and performs all his *official* and social duties."—1 *Greenleaf's Ev.*, 47; *Bank U. S. vs. Dandridge*, 12 *Wheat. Rep.*, 69, 70. The security is only liable, on his contract, for some *default* of the guardian, while he is such security. The legal presumption is, the guardian managed the money and effects of his ward properly—that he obeyed "*the mandates of the law and performed all his official duties, till the contrary is proved,*" *up to the time of the discharge of the security*. Besides it is a rule of evidence, that the obligation of proving any *fact* lies upon the party who substantially asserts the affirmative of the issue.—*Greenleaf's Ev.*, 1st vol., 89. "Where *nonfeasance* or *negligence* is alleged, in an action on contract, the burden of proof is on the party making the allegation, notwithstanding its negative character."—1st *Greenleaf's Ev.*, 96, and cases there cited.

the plaintiff's action on the bond, the defendant pleads he was

discharged by the Court of Ordinary, on the 25th November, 1839. By the common law rule of pleading, the plaintiff would have replied, in order to avoid the effect of the defendant's plea, some *default* or act of waste on the part of the guardian *prior* to the discharge of the defendant. The plea of the defendant makes the *time* of the default material.—*Gould's Plead.*, 92, 93, 94. Although our Judiciary Act of 1799 dispenses with the replication on the part of the plaintiff, yet it does not dispense with the *proof* required by law on the trial. Would a replication on the part of the plaintiff, alleging the reception of the money by the guardian, prior to the discharge of the security, and the insolvency of the guardian at the time of the trial, be a sufficient answer to the defendant's plea of discharge to entitle him to judgment under the law? We think not, for the reason it does not allege any *default* or other act of *malfesance* on the part of the guardian, *prior to the discharge of the security*, which in law would constitute a *breach* of the bond. In *Trimmier vs. Trail*, the suit was against the security of an administrator's bond who had been discharged by the Ordinary.

To the defendant's plea of discharge, the plaintiff replied, a purchase by the administrator at his own sale, and a decree by the Ordinary therefor. In giving judgment on a demurrer to the replication, the court say—"To be an answer to the plea, the replication ought to have shown a *liability existing* in the administrators and their sureties, *before the order of discharge was made by the Ordinary.*" So here the plaintiff should have proved, on the trial, some *liability existing*, or incurred by the guardian, *before the order of discharge was made by the Court of Ordinary*, to render the security liable on his contract.

We are of the opinion the plaintiff should allege specially, in his declaration, the *particular acts* of the guardian, which he insists to be a breach of the bond; and if he seeks to make a discharged security liable, he must prove, on the trial, such acts of malfesance on the part of the guardian, as in judgment of law will make him liable, *before the date of the security's discharge*. According to the rule laid down in *Trimmier vs. Trail*, a general decree against an administrator, or guardian, made *after* the discharge of the security, establishing a *general default* on his part, would not be sufficient to make the discharged security liable. In order to make the discharged security liable, the decree must purport to charge the administrator or guardian with some act of maladministration *before* his discharge. In *Trimmier vs. Trail* the court say—"In this case it does not appear that the decree was founded on a liability which had attached, previous to the discharge, and if we understand the facts correctly, as they came out on the trial of the issue submitted to the jury, none had in truth attached. The defendant, therefore, cannot be made liable to pay a decree made in 1818—nearly two years after his discharge—which does not purport to charge the administrator for any act of maladministration *before* his discharge." It is true, the facts in the case of *Trimmier vs. Trail* were not such as to render the administrator liable for any *default*; but the particular facts of that case do not in the least impair the *legal principles* advanced and established by the court.

In *Vaughan vs. Evans*, 1st *Hills Ch. Rep.* 414, the liability of securities appears to have been well considered. From the facts reported, it appears that Evans was appointed a commissioner in equity, and gave

bond with security. At the expiration of his term of office, he was reappointed, and gave new bond with security. During his second term of office, it was ascertained he was a defaulter for the sum of \$32,935 98. The contest arose between the two sets of securities; the securities to the last bond contending, the securities to the first bond were liable for *all moneys* received by Evans in his official capacity, during his first term of office, and not paid over to the parties entitled thereto. It was contended in behalf of the last set of securities, that the securities to the first bond were liable for all moneys received by Evans, during his first term of office, that it was the receipt of the moneys, and not the *neglect, or refusal to pay over*, which fixed the liability of the first securities, and that on a demand made, and refusal to pay over, during his *second term*, the default will have relation back to the time when the money was received, and render the first securities liable therefor. It appears a large portion of the money for which Evans was in default, was received by him during his *first* official term, and, in some instances, had been ordered by the court to be invested or paid out. The Chancellor before whom the case was tried, held the commissioner Evans was not guilty of any default during his first term, for which his securities of that term were liable, on account of the *bare reception of the money*—unless, he says, “it was misconduct to perform his duty, by receiving it, and holding it *until demanded*.” The Chancellor takes up the cases in which Evans had received the money, during his first term separately. Speaking of the claim of the children of Willie Vaughan, he says, “There was no order to pay out the fund received by Evans during his first term—there was no *demand*. Nor could any payments have been made to the children, they being infants. Edward Newhall’s claim—the fund was received during the first official term, no order made to pay it out, nor any *demand* until the second term. Of course, upon the principles I have applied to the foregoing claims, this cannot be charged to the first set of securities.” From the decree of the Chancellor an appeal was taken upon several grounds, two of which are as follows: “Because the sureties in the first bond are liable for all moneys received by the commissioner during that term, unless they show that the same were paid over to his successor”—“*Because the receipt of money during the first term charges the sureties; and the fact that when called on, he is not able to pay, is conclusive evidence of default during that term, until the contrary is made to appear.*”

The decision of the Chancellor was sustained, with one exception. A majority of the court held that in those cases in which the commissioner had been ordered by the court to pay over, or invest the money in his hands, during his first term, and had neglected to do so, ought to be regarded as *prima facie* evidence of a *demand*, and the first securities liable therefor. HARPER, Judge, sustains the Chancellor throughout. He says: “It will be necessary to add very little to the very satisfactory reasoning of the Chancellor on the several points involved in this case. If it were shown that the commissioner had *wasted, or converted to his own use, the funds officially in his hands, as by purchasing property with a bond taken by* as commissioner, during his first term of office, I should think the sure—that term ought to be answerable. But in the absence of any testimony on the subject, the presumption is that he retained the funds, and

that they were in his hands as his own successor." After reviewing the authorities, the learned judge continues: "There was no *default*, and no cause of action against Evans till the money was demanded, and he refused to pay it; and no demand was shown *during the first term*." The other two judges, Johnston and O'Neal, say: "We concur generally in the views expressed in this opinion; but we are of opinion the neglect of the commissioner to pay over or invest money, *as ordered by the court*, was a breach of the condition of the bond, and that the application for such order ought to be regarded as *prima facie* evidence of a demand, and that the sureties to the bond of the term in which such order was made are liable, and the decree of the circuit court is ordered to be accordingly so modified. In other respects it is affirmed." On what principle was it that the first securities of Evans were held not to be liable for moneys received by him during his *first term* of office? Clearly, because it was his duty as an officer to receive the money, and no *default* or *malseasance* was shown on his part in relation to its application during the time they were bound for him. One of the grounds of the appeal from the decision of the Chancellor asserts the position taken by the plaintiff in error in this case, that "*the receipt of the money during the first term charges the sureties, and the fact that when called upon he is not able to pay, is conclusive evidence of default during that term, until the contrary is made to appear.*" But this ground, as we have seen, was overruled by the court, and the principle distinctly asserted, that to make a security liable on his contract for the faithful performance of a legal duty, some *breach* of that contract must be *affirmatively* shown by his principal, during the time he is bound for him. The reception of the money by Woods, the guardian, was no *breach* of his bond; it was his *duty* to receive it. The fact that he was insolvent at the time of the trial, is no evidence he wasted his ward's effects *during the time Vason was his security*. The insolvency of the guardian subsequently to the discharge of his security, may be *prima facie* evidence he wasted the effects of his ward at *some time*—but when? We are all of the opinion, not only on principle but authority, that the burden of proof is on the plaintiff, when a security has been discharged, to show *affirmatively* some act of waste or maladministration on the part of the guardian *prior to such discharge*. The bare reception of the money by the guardian before the discharge of the security, and the insolvency of the guardian at a period *subsequent* to such discharge, would not, in our judgment, be sufficient to render the discharged security liable, without further evidence going to establish a breach of the bond by the guardian *prior* to such discharge.

The Act of 1805, providing for the discharge of securities, was a *remedial* statute, and it is the duty of the court so to construe the Act as to suppress the mischief, and advance the remedy.—1st Bl. Com. 87.

If the discharged security is to be made liable for the money received by the guardian before his discharge, without further proof of default or waste, as contended for at the bar, the act of 1805 would afford no remedy to the security; for, in most instances, the money and effects of the ward are turned over to the guardian shortly after his appointment. The security would be liable, at all events, for the money received by the guardian in the lawful discharge of his duty, although no *default* or *waste* shown prior to his discharge. The legislature, in our judgment, in

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tended to afford *substantial* relief to securities. The counsel for plaintiff in error relied on a *dictum* in the case of *Field vs. Pelot*, (*McMullan's Eq. Rep.* 383,) in which Chancellor Harper intimates as his opinion, where a guardianship should be revoked, it would not be necessary to show the guardian had wasted the funds, or committed any act of mal-administration before the revocation. This dictum of the learned Chancellor does not appear to us to be well founded in principle, or sustained by the previously adjudicated cases in that State. Chancellor Johnston, who dissented from the opinion of the court in that case, says: "No case can be found, (I speak with confidence,) in which, after new security given, the preceding sureties had been charged, unless some *breach of duty* was committed by the principal during *their time*, and then, their liability has always been restricted to that." The view taken of the question by Chancellor Johnston, is sustained by the cases of *Trimmier vs. Trail*, and *Vaughan vs. Evans*, before cited, in both of which Chancellor Harper concurred, and which we think is founded on the better reason.

The court below having decided the discharge of the first securities, released them from all liability, both *past* and future; the judgment must be reversed on that ground, and a new trial granted.

No. 16.—NOBLE A. HARDEE et al. plaintiffs in error, vs. STOVALL, SIMMONS & Co., defendants in error.

The dismissal of an appeal is a judgment of the court remitting all parties to the condition and rights which they occupied and held at the time the appeal was entered. So, of the withdrawal of an appeal. The consent of the appellee that the appellant withdraw his appeal being approved by the court, he is remitted to the condition and rights which he occupied and held at the time he entered his appeal.

Where no judgment has been signed, but a verdict rendered and an appeal taken and withdrawn, the verdict is revived, and judgment may, as matter of right, upon exhibition of the record showing the dismissal or withdrawal of the appeal, be entered up *nunc pro tunc*.

The lien of a judgment is not extinguished by an appeal being taken, but suspended. Although the appeal opens all the merits of the issue, yet it does not vacate the first verdict or judgment. This effect is worked only when there being a rehearing there is a new verdict rendered and a judgment on the appeal; and not even then so as to authorize alienation of property intervening the two judgments.

This was an issue tried before Judge GAMBLE, at the April term, 1846, of Burke Superior Court, between the above-mentioned parties, who were plaintiffs in execution against one Byne, and who were respectively claiming money raised by the sale of Byne's property, upon a rule taken against the sheriff at the instance of the defendants in error, each claiming the money on the ground of priority of their respective judgments. It appeared that a judgment was confessed by the defendant in execution (Byne) to the defendants in error at November term, 1842, of Burke Superior Court, from which an appeal was taken by Byne, and the continued pending on the appeal until November term, 1843, when

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it was dismissed by the consent of parties, (Stovall, Simmons & Co., and Byne,) and the verdict and judgment confirmed, and the execution issued from the judgment in favor of Stovall, Simmons & Co. was claiming the money. While the cause was thus pending on the appeal, at the term preceding its dismissal, Noble A. Hardee and others, plaintiffs in error, recovered and signed judgments against Byne, whose executions were claiming the money adversely to that of Stovall, Simmons & Co. Upon this state of facts the court below decided that the judgment of Stovall, Simmons & Co. was, by priority of date, entitled to the money, and ruled accordingly; to which the plaintiffs in error excepted, and assign for error in said decision:

1st. That the judge erred in deciding that, where an appeal is entered in any cause in this State, the lien created by the first judgment (except so far as the same arises out of, and is authorized by, the act of 1822) on the property of a defendant is not destroyed by said appeal.

2d. The Judge erred in deciding that the appeal does not (in language which use has made in our State legitimate) carry the case up in its *totality*, and subject to all new lights which may be thrown upon it in law and fact; subject to all amendments of the pleadings; and operative until the court appealed to renders its judgment or decision upon said appeal, and orders and directs an effective judgment, upon which execution may issue to enforce the same, which takes its lien from the time of its entry.

3d. The Judge erred in deciding that if the last judgment is to relate back to the time of the first judgment, it would not be retroactive in its effect, and therefore contrary to law.

E. STARNES for plaintiffs in error.

The error of the court below, we think, had its foundation in the supposition that an appeal under our Judiciary act is analogous in its character and incidents to the common law process which removes a case from an inferior to a superior tribunal. Such a proceeding confessedly is intended only to *suspend* the case in the inferior court until the law can be ascertained by the superior tribunal and applied to the facts, when the case is returned with directions to the court below.

Our proceeding by appeal is a creature of statutory provision intended to furnish a process by which a party dissatisfied with the verdict first rendered, (whether error be committed or not) may remove his case from the tribunal of first resort, *permanently*. It is not a process intended to carry up a case to another court for the purpose of having the same facts determined by a different construction or application of the law *ex. gr.* a *writ of error*, and a *certiorari*—it is not intended to restrain the proceedings of the court below until inquiry can be made into other *relations* of the *ex. gr.* an *injunction*. For in each of these proceedings the cause is *temporarily* suspended only in the first court, and *temporarily* removed only to the superior tribunal.

But it *permanently* removes the case in its relations and its incidents, its law and its facts, from a trial before an inferior court, or from a petit jury, and carries the same to a superior court and a special jury, where it remains and never returns. The system of appeal, therefore, adopted by our statute has no analogy to common law proceedings—its elementary principles have been borrowed, perhaps, from the civil law—but they thus differ from the legal features of those writs somewhat similar to common law. Our proceeding is a *total* removal of the cause from the court below, so that it may be modified, amended, remoulded and made, as it were, a new case, and its trial becomes a new trial. In this view the argument is legitimate and conclusive that the cause being *permanently* removed to another tribunal, or that which is in effect another tribunal, its incidents must follow—the judgment is one of them, and it too must be removed and vacated—its *incidents* (its lien for example) must as a necessary consequence follow its fate.

When thus deprived of vitality, when thus made dead, what shall galvanize the corpse into life? Shall that result be effected by machinery which has no connection with it? To drop the figure,—Shall a court, whose decision is independent of, and made without reference to, the first judgment, by such decision restore its vitality? This is not reasonable. This view is not altered by a dismissal or discontinuance of the cause by the court of appellate jurisdiction before verdict rendered. That court may, by its order—which is its judgment—dismiss the cause, *but it does not send it back*. The judgment should therefore take its incidents, its date and its lien, from the term and the court where the cause alone exists.

The statutes of Massachusetts authorize appeals; and in all essential principles they are similar to our statutes. Their decisions, having reference to this subject, may therefore assist our inquiry. To that effect I cite several of them.—20 *Pick.* 512; 18 *Pick.* 2; 5 *Mass.* 376. An examination of our Judiciary Act of 1797, sec. 37, will show that our legislature of that day regarded the appeal as a new trial, which phraseology favors the view which we advocate.—*Crawford & Marbury's Dig.* 290. If the verdict has been in favor of the plaintiff on the first trial, and the appeal is dismissed by the court of appellate jurisdiction, the order or judgment of this court gives him the right of recovery against the defendant—it *adopts* the finding of the jury below, and authorizes judgment, which regularly should be then entered thereon. If then entered, it must take its date from that term. If it be allowed to take its date from the term of its first judgment, is it not made to *retroact*? And is this just? is it lawful?

If a different doctrine be adopted, and the order of the court be said to revive the first judgment, so as to make it take its date from the first term—if the judgment be thus made effective and complete from the first term, must not its incidents also exist from that date? If it therefore take its date from the first term, must it not also take its *lien* as a consequence from that term? If so, it is a *real* lien, the lien of a judgment; it *attaches to property*. In such a case as that we are considering, it attaches to the property of the defendant; and though that property have been sold by a younger execution while the older judgment was suspended, yet if the older judgment has lien from prior date, it can certainly be levied on this property, and require it to be resold. This seems to be a natural result of the doctrine. But who is prepared to contend for this? No one. This reasoning consequently would seem to be decisive of our case, if we had no statute of our own upon the subject. But our statute of 1822, (*Prin. Dig.*) we regard as settling the question with the authority of legislative enactment.

A different doctrine destroys precision in the administration of law, and the enforcement of remedies, and mars the symmetry of that law.

Let us illustrate.

A obtains a verdict against B, on the first day of January, 1844, from which B appeals. C obtains a verdict against the same defendant, on the first day of June, 1844. B does not appeal from the verdict. A's case is not tried until January, 1845. Each case is for the sum of \$1,000. B has just \$1,000 of property. C orders his *fi. fa.* to be levied immediately. If the Sheriff is diligent, he gets the money, pays it over to C, and he puts it in his pocket. Can A prevent the Sheriff from paying over the fund? No. He gets his final judgment in January, 1845, execution issues, but B has no more property. Yet, by the doctrine contended for by the defendants in error, the court has decided that his judgment is older than the judgment which sold the property. If it be so, then, can he have it now levied on the property sold, and have it re-sold, *because it has a lien on this property*? No. What sort of a *lien*, then, is this? Is not the doctrine, therefore, repugnant to well-recognized principles of law? We certainly think so, and for this and other reasons, think the court below has committed error.

C. J. JENKINS, for defendants in error, replied :—

By the Court—NISBET, Judge.

The defendants in error, Stovall, Simmons & Co., instituted suit in Burke Superior Court, against Enoch Byne—at the trial term, Byne confessed judgments to the plaintiffs, and upon this confession, judgment was duly entered up. Stovall, Simmons & Co., appealed, and at the

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November term of the court, 1843, with the consent of the appellee, withdrew their appeal. After the confession of Judgment to Stovall, Simmons & Co., and before the withdrawal of the appeal, Noble A. Hardee et al. plaintiffs in error obtained Judgments against Enoch Byne. Money being raised by the execution, issued on the Judgments of the plaintiffs in error, by sale of the property of Enoch Byne, the defendant, was claimed in the hands of the Sheriff, by Stovall, Simmons & Co., and upon a motion to distribute, the court below ruled that the lien of the Judgment of Stovall, Simmons & Co., took date from the time of the confession at common law, and *not* from the time of the withdrawal of the appeal, as was claimed by the plaintiffs in error, and ordered the money to be paid to them.

The error alleged is founded on this order, and the decision of the court as to the lien of those judgments upon which it is based. The question, therefore, for this court to determine is, whether the lien of a judgment at common law, from which an appeal has been taken by the plaintiff and withdrawn, dates from the time of the judgment at common law or not. It is the opinion of this court, that under such circumstances, the lien takes effect from the date of the judgment at common law. In cases where the appeal is dismissed by order of the court, as, for example, want of security, or because of insufficient security, it will scarcely be questioned, but that in such cases the lien of the judgment is good from the time it was first obtained. The dismissal of the appeal is the judgment of the court, remitting all parties to the condition and rights which they occupied and held at the time the appeal was entered; and at that time the plaintiff had a perfect judgment, with all the liens which attach to it by law. Such, too, we think is the case when the appeal is withdrawn. The consent of the appellee that the appellant withdraw his appeal being approved by the court, he is remitted to the condition and rights which he occupied and held at the time he entered his appeal. In the latter case the consent and withdrawal does what is effected by the court itself in the former. If in either case the judgment has not been signed, but a verdict rendered, it is our opinion that the verdict is revived, and judgment may as matter of right, upon exhibition of the record showing the dismissal or withdrawal of the appeal, be entered up, *nunc pro tunc*. The truth is, that the lien of the judgment at common law is not extinguished by the appeal, but suspended. It is not true, although the appeal opens all the merits of the issue, that it vacates the first judgment or verdict. This effect is worked, only when, there being a rehearing, there is a new verdict rendered, and a judgment on the appeal, and not even then, as we shall see, so as to authorize alienation of property, intervening the two judgments. The appeal is entered, and, indeed, the privilege of the appeal is given, for the benefit of the appellant. After the appeal is entered, there are cases in which the appellee acquires by that fact additional rights, but the rights of all other persons remain the same.

If, then, the parties alone interested consent to a withdrawal, who is injured thereby, and who has a right to complain? Not the defendant at common law, because he occupies no worse position than he would have held had there been no appeal—not other judgment creditors, for their rights are neither greater nor less than they would have been with-

the appeal. The court does not see the force of the objection, that title to property which has been sold during the suspension of the lien, will be disturbed by a resale. The title of property sold under a valid subsisting judgment is good, and will be protected against any and all judgments open against the same defendant; much more conclusively is it true, that such a title will be good against a judgment, whose lien was at the time of sale suspended by the act of the plaintiff, and as to that sale extinct. It does not, however, follow that money raised from the sale of the defendant's property may not be applied to the revived judgment. So long as that is in the custody of the court, or its officer, it will control its distribution and apply it to the oldest liens.—*Hotchkiss*, 599. By act of the Legislature, the right of an appellant to withdraw his appeal, with the consent of the appellee, is recognized; and it may be fairly assumed that the consequences which we have held to flow legitimately from the withdrawal, are also thereby recognized.—*Prin. Dig.* 426. In the argument of this cause, it was contended that any fair construction of the act of December, 1822, defines what shall be the lien of judgments upon withdrawn appeals, and limits that lien to the date of the withdrawal. It does not seem to us that this is a fair construction of that act. That act was intended to apply to cases, upon which, on the appeal, there was a judgment rendered, and so far as such cases are concerned, fixes the date of the lien at the time of its rendition, except to prevent alienation of property between the signing of the first judgment and the signing of the judgment on the appeal. It does not apply at all to appeals withdrawn. To bring any case within the provisions of this act, there must be a rehearing and judgment on the appeal. In this case there was not, and could not be in the nature of things, a judgment on the appeal.—*Prin. Dig.* 45.

By the second section of the same Act, it is provided that "all judgments signed on verdicts rendered at the same Term of the court be considered, held and taken to be of equal date, and no execution founded on said judgments, obtained at the said Term aforesaid, shall be entitled to any preference by reason of being first placed in the hands of the officer." It is upon this section that we plant the opinion now rendered.

Aside from all other reasoning, it is sufficient for us, that the Legislature has declared, that all judgments signed on verdicts rendered at the same Term, shall be of equal date, thus fixing the date of all judgments at the Term they are signed, and of consequence their lien at the same time. It is true, as urged by counsel for the plaintiffs in error, that this section was intended to repeal that provision of the Act of 1799 which gave preference to executions first in the hands of the officer. But this was not its only intention; because it repeals the Act of 1799, as stated, it does not the less declare, "that all judgments signed on verdicts rendered at the same Term of the court shall be considered, held and taken, to be of equal date." It is therefore the opinion of the court, that the judgment of the Circuit Court in this cause be affirmed.

No. 17.—LEONARD F. CHOICE, by his guardian, &c., plaintiff in error, vs. STEPHEN B. MARSHALL, defendant in error.

Where a testator bequeathed to his daughter certain negroes, with their future increase, "*during her natural life and the heirs of her body forever*;" held that the words must receive their technical signification—there being nothing in the will to authorize the belief, that the testator may have used the words improperly and not in their legal meaning.

This was a bill in Equity, brought in Putnam Superior Court, against Stephen B. Marshall by Leonard F. Choice, an infant, who sued by his guardian, John Graybill. It alleged that Leonard Fretwell, the grandfather of the complainant died testate in the year 1820, leaving, unrevoked and in full force, his will—a copy of which is hereto appended.^(a) That, by the third item in said will, particular negroes were, by the testator, bequeathed to his daughter, Mary Fretwell, "*during her natural life, and the heirs of her body forever*." That after the death of her father, Mary Fretwell intermarried with one William Choice; and that the said negroes, by the assent and approbation of the Executors, went into the possession of her said husband, who held them by virtue of his marital rights. The bill further stated that the complainant was the only child of the aforesaid marriage; that Mary, the mother, was dead; and that he was entitled to all of the negroes, with their increase mentioned in the third clause of the testator's will. That Cloe, one of said negroes with her descendants—children and grandchildren—had got into the possession of the defendant by purchase or otherwise, who refused to deliver them up, or account for their hire. There was the usual prayer for relief. To this bill the defendant demurred. First, for want of Equity; and, secondly, because the party had full and complete remedy at common law. The cause came on for hearing, before the Hon. J. A. Merriwether, circuit Judge, March Term, 1846; who

(a) *Copy of Leonard Fretwell's Will.*

In the name of God, Amen! I, Leonard Fretwell, of the county of Putnam and State of Georgia, weak of body, but of sound mind and memory, and bearing in mind the mortality of my body, and knowing that it is appointed for all men once to die, do make, constitute, and ordain this my last will and testament, in manner and form following, viz: Item 1st. I give and bequeath unto my son, John Fretwell, the tract of land whereon I now live—also the following negroes, viz: Charles, Moses and Jesse, to him and his heirs forever. Item 2d. I give and bequeath unto my daughter, Martha, during her natural life, and the heirs of her body forever, the following negroes, with their future increase, viz: James, Nancy, Suckey, Phebe and Eliza—also one bed, bedstead, and furniture, and a good saddle and bridle. Item 3d. I give and bequeath to my daughter, Mary Fretwell, during her natural life, and the heirs of her body forever, the following negroes, with their future increase, viz: Lydia, Cloe, Lucy, and Joe, also one bed, bedstead and furniture and a good saddle and bridle. Item 4th. I wish for my daughters, and their negroes to continue to live together with their brother, and work as heretofore, as long as they see cause. Item 5th. After the payment of my just debts I give and bequeath the balance of my estate, both real and personal, to my son, John Fretwell, to him and his heirs forever. Item 6th. I nominate John Fretwell and Jesse Little, Executors to this my last will and testament witness whereof I have hereunto set my hand and seal this 14th of April, 1820

sustained the demurrer on the *first* ground, and decided, that by the *third* item in her father's will, Mary Fretwell took an absolute estate in the property bequeathed in said clause—the words “*heirs of her body forever*,” as used therein, being words of *limitation*, and not of *purchase*. To this opinion of the court below, the complainant excepted, upon the ground, That the words used in the *third* item, conveyed an estate for life only to Mary Fretwell, with remainder in fee to complainant as a purchaser.

F. H. COXE, for plaintiff in error.

The intention of the testator is the governing rule in the construction of wills. This rule is paramount to all others, not even a technical meaning attached to any particular words, controls it.—*Doe vs. Leming*, 2 *Burrows*, 1100; *Croke James*, 570; *Hargrave's Law Tracts*, 565, 572, 575; *Fearne on Remainders*, 186; 1 *Munford*, 537; 14 *Johns. Rep.* 1; 2 *Dallas*, 244; 5 *Peters*, R. 68. The authorities, which are abundant, are all on one side. Indeed, it would seem strange that any other rule should prevail, in relation to the construction of any instrument. This intention must be lawful. That is, the testator cannot make a disposition of his property that the law prohibits. But before a court can refuse to carry into effect the provisions of a will, they must be satisfied that the testator intended to do that which the law prohibited from doing.

This is never to be presumed; for when two constructions can be given to a will, one of which is lawful and the other unlawful, that which is lawful shall prevail; for no man shall be presumed to have intended an unlawful act. What was the intention of the testator in the will under consideration? He appears to have had a son and two daughters, the objects of his bounty. To the son he gives his property absolutely, “to him and his heirs forever.” To each of his daughters he gives the property to them for life, and to the heirs of their bodies forever. Certainly he did not intend the same estate to his son and to his daughters. The estate is to his daughters for life only. Could any superadded words make the intention clearer than that he only intended an estate for life to them? This was a lawful intention; he had a right to restrict them to a life-estate if he thought proper. But it is said the remainder is to the “*heirs of their body forever*.” This is true, and this brings us to the only question in this case. *Whom did the testator mean by the words, “heirs of her body forever?”* Did he intend to describe a class of persons who should take in succession from generation to generation, in all coming time, or did he intend the children of his daughter Mary? If the court are satisfied that he intended the former, and that his object in using those words, was to entail this property upon the lineal descendants of his daughter, then the case is for the defendant, because such intention is unlawful. But if the court shall come to the conclusion that such was not his intention, but that, by the use of the words “*heirs of the body*,” the testator intended to designate the children or grandchildren of his daughter, then the case is for the plaintiff. If the words were used in the former sense, they are words of *limitation*, and describe the extent of the estate that his daughter was to take. If in the latter, they are words of *purchase*, and describe the persons that are to enjoy his property, after the death of his daughter. I contend that it is wholly immaterial by what words an idea is conveyed to the mind; the only inquiry for the court is, are we satisfied that the testator did not intend to entail this property? If the court is satisfied that he had no such intention, they are disappointing his intention by saying that he had, and they are violating that positive and unbinding rule of law that says, the intention *shall govern*. But it is said that the words, “*heirs of the body*,” create an estate tail, according to the rule in *Shelly's case*. This may be true; but the rule in *Shelly's case* was made to effectuate the intention of testators, not to disappoint them. It was a rule established by the English courts, several centuries ago, at a time when estates tail were not only lawful but very common. It was, therefore, fair to presume that by the use of these words testators intended to create such an estate. Indeed it was admitted then, and in all subsequent cases where the rule has been applied, that such was the general intent of the testator, and although by giving a previous life estate he had manifested an intention that the first taker should have only such an estate, yet as this was a particular intent, and

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as the general intent was to create an estate tail—as these two intents could not stand together, the particular intent must yield to the general intent, according to a well-known rule of construction. This, together with reasons of Feudal policy, which never existed with us, are the reasons for the establishment of the rule in Shelly's case. In most of the cases that have occurred since the decision in Shelly's case, the English courts have admitted that the rule must yield to the superior force of intention, and have, therefore, laid hold of any words that showed a different intention.—*Doe vs. Laming*, 2 *Bur. Rep.* 1100; *Perrin vs. Blake*, 4th *Bur.* 2579; 2 *Vent.* 341; 1 *Ves. Sen.* 145; 4 *Bro. C. C.* 542. In the case of *Doe vs. Laming*, Lord Mansfield, after referring to all the leading cases on the subject, and reviewing of them, says: "It appears, therefore, that there is no such invariable rule of construction, as has been supposed, that words of limitation (heirs of the body) shall never be construed words of purchase;" and they were so construed in that case. In a subsequent part of the same decision, the learned judge remarks: "There is no rule of law that prevents heirs, or heirs of the body, being taken as purchasers, where the intention of the testator requires that they should be so." Such was also the opinion of the other judges who sat in that case. The same doctrine has been fully established in our sister States.—1 *Hen. and Munf.* 240; 3 *Coll.* 50; *Devcreux Eq. Rep.* 189; 4 *Hawkes' Rep.* 227; 1 *Dessaure*, 353; *Miss. Rep.* 260; 1 *Bailey's Rep.* 119; 1 *Porter's Rep.* 152; 4 *Stewart and Porter*, 286; 6 *Yerger Rep.* 98; 9 *Id.* 4; besides a vast number of other cases, to which it is unnecessary to refer. It may be said that in most of the cases referred to, and others that may be found in the books, that these were words of explanation referable to the words, "heirs of the body." This may be true, but it does not alter the principle, or the criterion by which the judgment is to be formed. These superadded words are evidence that the testator did not intend by the use of the words, "heirs of the body," to create an estate tail. These may be necessary in a country where estates tail are lawful, in order to rebut the presumption that the testator intended to create such an estate. But can they be reasons here, where estates tail, if they ever practically existed at all, have been abolished since 1777.—*Watkins Dig.* 15. Can the court believe that this testator intended by the use of these words to create an estate which had been abolished, and made unlawful for nearly half a century previous to the making of the Will, and which estate at the time he was attempting to create, he knew that he could not create? Is this court to presume that by the use of these words, "heirs of the body," this testator intended to do a thing which was unlawful, and which he knew he could not do? because by the use of the same words in England, it has there been presumed that the testator intended to create an estate tail, which is a lawful estate, and which a testator there has a perfect right and power to create. It appears to me that the presumptions here are entirely different from what they are in England, because our law is entirely different.

It is a question of intention, looking to the habits, laws and circumstances with which we are surrounded. If the court come to the conclusion that this testator did intend to create an unlawful estate—that such was his object in the use of these words, "heirs of the body," then the case is for the defendant; but if their minds are satisfied that he had no such unlawful intention, but intended to provide for his grandchildren—the children of his daughter Mary—then the case is for my client.

JOHN G. McHENRY for defendant.

The entire controversy in this case, as appears, grows out of the construction and operation of the term heirs of her body forever.

The general rule of law is, that those terms do not denote any particular person, to take by way of description, as devisee, grantee, or donee. Neither does any estate, by the use of those terms, vest in any person in character of heir, but only in the person of him who is named in the instrument of conveyance, who takes by purchase. But the heirs there named do not take as purchasers—they are words merely descriptive of the estate given.—*Reever's Dom. Rel.*, 455; *Brett vs. Rigden, Plow.*, 343.

The following is an incontrovertible position, and so generally allowed, that wherever an estate is given to any one for life, and to his heirs, or to the heirs of his body, and there is nothing more in the case, the first taker invariably takes a fee simple in the former case, and a fee tail in the latter; and this as well in a devise, as in any other instrument of conveyance. The words "for life" being considered as a surplusage. Thus far, this rule which has been laid down in Shelly's case has

vailed without contradiction.—*Shelly's case*, 1 *Rep.*, 93; *Tucker's Com.*, 135; *Reeves' Dom. Rel.*, 457.

However, as contended for in deeds, but more especially in devises, the above-stated rule has been broken in upon, where the intention of the testator to do so manifestly appears, and such intention is consistent with the rules of law, which proposition we readily admit. And here we propose to call the attention of the court to the principal leading cases where apparently the rule of law as laid down has been made to yield to the manifest intention of the testator, and point out wherein we conceive the case at bar differs materially from those cases; and in doing so we propose simply to cite the cases, state the terms of the devise or conveyance, give the judgment of the court, and point out what we conceive to be the striking want of analogy to the case at bar.

The first case which we call the attention of the court to, is the case of *Archer Co.* R. 66—"which was a limitation in a devise to A for life, and to the next heir male of the body of A, and the heirs male of such next heir male."—"Held that A took an estate for life only, and the heir male a remainder in tail, vesting in him by purchase, and this from the manifest intention of the testator." To the same purpose is the case of *Clerk and Day, Cro., Elis.*, 313. For although the phrase "heirs male" was sufficient to give an estate tail, and such limitation to A for life, and to his heirs, would have given an estate tail in A, yet the using of the phrase "*next heir male*," and the superadded words of limitation, "his heirs male," it was manifest that he used the phrase "*next heir male*" as descriptio personarum who should take an estate tail, and consequently A took no greater estate than one for life.

To the same purpose is the case of *Luddington vs. Kinc, Ld. Raymond*, 203—where A devised lands to B for life, without impeachment of waste, and in case he should have any issue male, then to such issue male and his heirs forever. Held to be an estate for life only in B, and a contingent fee in his issue male. Determined clearly on the manifest intention of the testator—for if B is supposed to take an estate tail, then must be rejected the words "without impeachment of waste," and the superadded words "his heirs forever." Here there were words which clearly manifested the intention of the testator to use the term "heirs," as a descriptio personarum, to wit, the superadded words of limitation and the phrase "without impeachment of waste," as waste.

So was the case of *Backhouse and Wells*, 1 *Eq. Cas. abr.*, 184. The devise was to A for life only; and after his decease to the issue male of his body and to the heirs male of the bodies of such issue.

To the same purpose is the case of *King vs. Melling*, 1 *Vent.* 231—where there was a devise to one for life and "*non aliter*," and after his decease to the sons of his body. Held to be an estate for life in the first taker on account of the words "*non aliter*"—thus decided for the same reasons as in the above cases. The intention was gathered from the devise. For establishing the same ground *Lowe vs. Davis, Ld. Raym.* 1561, is relied on, which was a devise. Benj. Devon and the heirs of his body, the first, second, and third, and every other son and sons successively, of the body of the said Benjamin, and the heirs of the body of such first, second, and third, and every other son and sons lawfully issuing, as they shall be in seniority of age and priority of birth—the eldest always, and the heirs of his body to be preferred before the youngest, and the heirs of his body—and in default of such issue then to his right heirs forever." Held that Benj. Devon took an estate for life only upon the manifest intention from the construction. Again in the case of *Lisle and Gray, T. Raymond*, 315, where John Lisle covenanted to stand seized of lands to the use of himself, for life; remainder to his son Edward for life; remainder to the first son of Edward in tail; with like remainders to his second, third, and fourth sons, and sons separately and respectively; to each of the heirs male of the body of Edward, and the heirs male of their bodies; remainder to William Lisle: Held to be a life estate in Edward for same reasons of intention. And such seem to be the real grounds of the decision of *Lord Hardwick* in the case in 1 *Vesey*, 142, viz: a manifest intention on the part of the testator to designate the heirs as purchasers, from the language used in the devise—although *Lord Hardwick* considers this case as being different from a legal estate, being a trust estate cognizable in equity. But we rely not on this distinction, as this ground of difference is clearly overruled in several cases.—*Watts v. Ball*, P. Wms. 108; *Philips vs. Philips*, P. Wms. 35; the opinion of *Wills Perrin and Blake*; *Ld. Mansfield* in *Doe and Lanning*, Bur. 1100; *Jones and Gan*, Br. C. C. Farther to establish the point that where a testator gives an estate to one, and remits it over to the heirs of his body, and plainly intends that the

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heir shall take by purchase, this intention shall control the case of *Doe* and *Laming* is relied on, *Bur.* 1100, by the other side. This was a devise of gavelkind lands to A C, and to the heirs of her body, as well females as males. Here the intention was manifest that heirs must take as purchasers, and necessarily A C only a life estate; as females could not take, in a course of descent, lands that were gavelkind.

In the case of *Doe vs. Laming* is cited the case of Walker and Snowe, (*Palmer*, 349,) which was upon a deed where E conveyed lands to the use of himself for life, remainder to his first son and the heirs male of his body begotten, &c., and so to his six sons, remainder to the right heir male of the said E, to be begotten after the sixth son and his heirs male. This was holden not to be an estate tail in E. Your honors will observe that the foregoing decisions have been based upon the ground that the legal construction or technical sense of any words shall not prevail against the intention of the devisor or grantor, when that intention is clearly collectable from expressions used in the instrument; and wherever it becomes certain that the term "heir or heirs" are used to designate individuals as purchasers, (from qualifying expressions or super-added words,) the courts have so construed them.—*Reeves' Dom. Rel.* 465; *Kent Com. vol. 4*, 221, 232.

But, on the other hand, if the testator designed to give the estate to those persons known in law as a class called "*heirs*," be they who they may, they must take by "*descent*," and not by "*purchase*." And to this point we call your honors' attention to the case of King and Melling. This was determined at first to give only a life estate, but was subsequently reversed.—*Vent.* 225; *Reeves' Dom. Rel.* 466.

Again; this doctrine is supported by *Coulson vs. Coulson*.—2 *Atk.* 246. This was a devise to C for life, remainder to A and B, and their heirs, to preserve contingent remainders to the heirs of the body of C. In this case it was determined that an estate tail in remainder was vested in C, he taking a life estate not merged by the devise to the heirs of his body, by reason of the remainder interposing between the devise to C for life and the subsequent limitation to the heirs of his body. Despite of what seemed to be the intention of the testator, it was made to yield to the rule of law that the ancestor cannot "*make his heir purchaser, eo nomine*." This case, decided in 1744, has been recognized to this extent since as law.—*Kent Com.* 223; *Reeves' Dom. Rel.* 478-9. This decision is also sustained by the case of *King vs. Burchell*, *Bur.* 1103; *Minshall vs. Minshall*, 1 *Atk.* 412. The notable case of Perrin and Blake, though in B. R. determined at first to convey only a life estate to the first taker, was subsequently, in Exchequer chamber, upon a writ of error, reversed.—*Reeves' Dom. Rel.* 474.

The case of *Bale vs. Coleman*, which was a devise to A and his heirs for payment of debts, and then to A for life with power to make leases for 99 years, remainder to the heirs male of A, was determined by Ld. Cowper to be an estate for life, but on a rehearing before Ld. Harcourt, was held to be an estate tail.—1 *P. Wms.*, 142. Since the determination of the case of *Coulson vs. Coulson*, there have been determined on the same principles the cases of Sayre and Watterman.—*Hodgson vs. Ambrose*, *Dougllass Rep.*, 337.

Since the determination of the case of Perrin and Blake, Lord Thurlow has held in the case of *Jones vs. Morgan*, 1 Br. C. C. 206, that a devise to trustees to stand seized to the use of A for life, and after his death to the use of the heirs male of his body severally successively, and in remainder, created an estate tail in A upon the same grounds of the preceding cases, that whoever takes in character of heir must take in quality of heir. All the efforts of the party to change the qualification, while he admits the character of heir, by saying that they shall take as purchasers or otherwise, are fruitless, and of no avail.

The conclusion that we arrive at from this cursory view of the authorities is, that where a testator uses technical expressions only, their technical meaning must be adopted, for this appears as the safer method of effecting his intentions. Where the term "*heirs*" is used, there being nothing else in the instrument or context to point out that he used them as designatio personarum, although he may have intended that they should take as purchasers, in character of heirs, this intention cannot be fulfilled, being in contravention of law.—*Reeves' Dom. Rel.* 479, 487; 4 *Kent's Com.* 221, 232.

But may it please your Honors, admitting for the sake of argument the position assumed by opposite counsel, that this is one of these cases where the intention can be ascertained, and that intention designed Mary Fretwell to take merely a life estate, (which certainly does not appear either from the entire instrument or the context,) what would be the construction given by the court to this devise? Would it not hold that Mary Fretwell took a life estate and her children a fee tail general? Now

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our statute vesting the fee simple in the first taker, when an estate tail is attempted to be created, did not this fee simple vest in the first taker here, and marital rights of the husband attach thereon. Counsel certainly could not contend that at common law, the heirs of Mary Fretwell would have acquired any other estate than a fee tail, for no case can be found, where the intention of the testator has been allowed to prevail so that the character of the estate in remainder, when *definitely prescribed*, could be altered or enlarged.

WM. C. DAWSON in conclusion for defendant.

LUMPKIN, Judge, having stated the facts of the case, proceeded as follows:—

We have bestowed upon this case the fullest consideration—which the time would permit—allowed for that purpose by the legislature, and are of the opinion that the judgment of the circuit court is correct, and ought to be affirmed.

The question mainly argued by the counsel for the plaintiff in error is—what the testator did *not* intend, and not what he *did*. By showing that he *did not* intend that his daughter Mary should take a larger estate than one for life in the property left her, he insists that it will do violence to the will to put an interpretation upon it that will give her the *fee*. Suppose that Mary had been the only child of the decedent; that he had bequeathed to her the whole of his negroes, with their future increase, during her natural life, and at her death directed the slaves to be emancipated? Is it not quite manifest that, in this case, the design of the testator would be to limit the legacy to life only? And yet, would not the law prohibiting manumission supervene this purpose, and vest the remainder in fee in the daughter? It is conceded that the cardinal rule in the construction of wills, is—that the intention of the testator shall govern. To this admission there is an important qualification, namely: *so far as that intention is consistent with the laws of the land, and no farther*. To stop short of this would be an infringement of that liberty of disposing of a man's own property, which is the most powerful incentive to honest industry, and is therefore essential to a free and commercial country; while, on the other hand, did indulgence to a testator's intention go beyond this, every man would make a law for himself, and the metes and boundaries of property would be vague and indeterminate, which would end in total insecurity.—*Har. Law Tracts*, 489. One of the first and most prominent examples to be found in the decisions, illustrative of the principle that the intention of the testator cannot control the construction if repugnant to law, is:—“*Where the devise would create a perpetuity*.”—*Vide Hovenden on frauds*, 255, and the cases there cited in note 88. And notwithstanding President Pendleton in *Kennon vs. McRoberts et ux*, (1 *Wash. Rep.* 102,) claims extensive latitude in the construction of wills, and speaks rather jeeringly of the judges having laid down rules by which they have tied a gordian knot, which they have since struggled in vain to unloose, and which he asserts it would have been better if they had cut at once. Still he admits that the disposition *intended* to be made must not conflict with the rules of law—“*which he understands as applying to restraints upon perpetuities, devises in mortmain, and the like*.” He declares, also, that “*the intention is not to prevail against settled and established rules of construction*.”

‘t it be said that when the testator's intent is manifest, that the court

will carry it into execution in despite of all the well-established rules of interpretation? It would be to clothe the judicial tribunals with a discretion which would illy comport with the well-defined powers of the various departments of our government. A father desires to bestow upon his son real estate sufficient to qualify him to be governor, and, to that intent, devises him a lease for a term of years of five hundred acres of land: could we convert, in this instance, however plain and praiseworthy the intent of the testator, a lease into a freehold? Surely not. So, though an estate be devised for life only, or for life, and not otherwise, or with any other restrictive expressions, yet, if there be afterwards added proper words to create an estate of inheritance in the heirs of the body, the latter language shall overbalance the former and make the first legatee tenant in fee.—*Shelley's Case*, 1 *Coke's Rep.* 96; *Butterfield vs. Butterfield*, 1 *Ves. Sr.* 133, 154; *Guth vs. Baldwin*, 2 *Ves. Sr.* 646; *Atkinson vs. Hutchinson*, 3 *Pr. Wms.* 259; *Daw vs. Chatham*, 2 *Fearne*, (347,) 464; *Robinson vs. Fitzherbert*, 2 *Bro. Ch. Rep.* 127; *Webb vs. Webb*, 1 *Pr. Wms.* 132. In all of these cases, as well as many of those which follow, there was an estate limited to one for life; the remainder to the heirs of the body, and the courts uniformly held, that the whole interest vested in the first taker, and that too, as the Lord Chancellor declared in one of them, *whether the testator intended it or not*.—*Hinson and wife vs. Pickett*; *Myers admr. vs. Pickett*, 1 *Hill Ch. Rep.* 35; *Horne et al. Lessee vs. Lyeth*, 4 *Harris and John. Rep.* 431; *Ward ads. Waller et al.* 2 *Speers' Rep.* 786; 9 *Yerger*, 209; 3 *Batt. Rep.* 455; 2 *Wash. Rep.* 9; 1 *Dull.* 47; *Binney's Rep.* 139; *McFeely vs. Moore*, 5 *Han. Ohio Rep.* 465. These cases are selected almost at random from the thousand and one which crowd the books of reports upon this doctrine.

The true inquiry, therefore, in the present case is, not what estate Leonard Fretwell intended to give to Mary his daughter, but what disposition he designed making of the remainder? No one, I apprehend, doubts that Mary Fretwell was intended to take a life estate only, and that her heirs were intended to take after her, but *how* those heirs were intended to take, whether as descendants or purchasers, is the question, and the *only question*. If they take as purchasers, then Mary Fretwell and William Choice, her husband, are tenants for life only, and the complainant in the cause below was entitled, after the decease of his mother, to sue for and recover the property. If, however, Leonard Fretwell meant that the heirs of his daughter should take by descent, or had formed no intention about the matter, then by irresistible consequence of law, the inheritance vested in the mother and through her, in the husband, from whom the defendant in the Bill (Marshall) derives his title. And the burden is upon the plaintiff in error. It is incumbent on him to show that the devisee shall take a different estate from what the plain legal import of the words conveys. Has he met and removed the difficulty? Has he shown that not only a mere life estate was given to the daughter, but that the testator has evinced that he did not intend to violate the policy of the law by creating a perpetuity? We think not: not a single authority has been adduced to justify the position, that the testator intended to deviate from the general rule, and it has been truly said that this is never supposed made out, not by conjecture, but by strong and conclusive evidence in the nervous language of Lord Hobart, by "declaration p"

The first case cited at bar is that of *Smith vs. Bell*, (1 *Parr.* 19, 68,) in which Chief Justice Marshall reiterates only what has been asserted in every testamentary disposition, previously, to wit: that the intention of the testator expressed in the will shall prevail, *provided it be consistent with the rules of law*. But how is this intention to be ascertained? He furnishes the answer "*from the words*."

Lord Mansfield's opinion in *Doe, &c. vs. Laming*, (2 *Barr.* 42,) is relied upon, and the Sticklers for the rule in *Shelly's case* have inadvertently on it, as we think, with unnecessary asperity. It grew out of a clause in the will of one Martin Long, to this effect: "Also give and devise one other equal, undivided fourth part, &c., unto my niece now wife of William Cornish, and to the heirs of her body lawfully begotten, or to be begotten, as well *females* as male, and to their heirs assigns forever, to be equally divided, share and share alike, as tenants in common, and not as joint tenants." Had the testator stopped at the words, "heirs of her body lawfully begotten, or to be begotten," would the court have hesitated a moment? On the contrary he heaps sentence upon sentence, circumstance upon circumstance, in order to tell every reader of his will how he would have it understood. The whole premises devised were gavelkind, and Lord Mansfield remarks—that it is obvious that the testator does not mean that the one fourth given to Anne Cornish should go in a course of descent in gavelkind; for he gives it to the heirs of her body *as well females* as males; and mentions *females*, not only expressly and particularly, but even prior to males; therefore they *cannot take otherwise than as purchasers*. It would be a *void* devise, if the words were to be construed as words of limitation, for he breaks the gavelkind descent, by giving it to *females*, as well as males. It cannot descend to females as well as males by the rules of gavelkind. and yet he seems to lay the chief stress upon the word "*females*." He adds likewise, "and to their heirs and assigns forever, to be *divided equally, share and share alike*;" nay, he goes further, "*as tenants in common* and not as joint tenants." But this could not be, if they were to take in the course of *gavelkind* descent, for in such case they must take as *coparceners*. In expounding this clause of the will there were other portions which reflected light upon it, and which materially influenced the court in ascertaining its meaning.

The decision in *Bradley vs. Mosby*, and *Walton vs. Mosby*, (3 *Call's Rep.* 50,) rests expressly upon the ground, that the slaves were given to the only proper use and behoof of the daughter of the donor during her natural life, and to the heirs of her body, to the only proper use and behoof of such heirs, "*their executors, administrators or assigns*." And Judge Roane, after noticing this distinction as settled by previous adjudications, states that if the use of the negro only had been given to the daughter for life, and a *naked* limitation engrafted thereon to the heirs, that he should have held that the *whole property vested in her*. The limitation over was supported in *Warners vs. Mason and wife*, (5 *Munf. Rep.* 242,) not because the testator devised the track of land, the subject matter of dispute, to the first taker *during his natural life*, but because of the expression—"and then to his heirs lawfully begotten of his body, *that is born at the time of his death, or nine calendar months thereafter*." Here the words "heirs of his body" were not considered words of limi-

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tation, but as *designatio personæ*, as was evident from the testator's describing those heirs as persons "*born at the time of his death, or nine calendar months thereafter.*" If the case of *Keith vs. Perry*, (1 *Dessaussure*, 353,) stood in opposition to the doctrine maintained by this court, (as it clearly does not,) it would be sufficient to say, that it has been overthrown by a series of subsequent adjudications in the same State.—See *Guerry vs. Vernon*, 1 *Nott and McCord*, 69; *Henry and wife vs. Felder*, 2 *McCord's Ch. Rep.* 323. In *Anderson vs. Jackson*, (16 *John. Rep.* 398,) the word *survivor* was held sufficient to show that the legacy was intended as a personal benefit to take place during the life of the person to whom the benefit was individually intended. In *Bell and wife vs. Hogan*, (1 *Stewart's Rep.* 536,) the court, it is true, supported the remainder as good and not too remote. It took care, however, notwithstanding the eloquent strictures of Chief Justice Lipscomb upon the rigor of the rule, to show that this case was withdrawn from its operation by the peculiar phraseology of Thomas B. Whitwell's will. The testator "lends to his daughter Elizabeth six negroes (naming them) and their increase during her natural life, and if she should leave an heir or heirs lawfully begotten of her body, then gives them to such heirs forever; and for want of such heirs, then to A. W. and others." It requires no comment to distinguish this case from the naked limitation in Leonard Fretwell's will. An argument has been drawn from *Archer's* case, (1 *Coke*, 66; *Fearne*, 150,) where the limitation was to A. for life; and after his death to the next heir male, and to the heirs male of the body of such next heir male. It was held that the devise to the heir was considered as a remainder to him by purchase. Now it is urged, that as primogeniture does not exist with us, that the term "*heirs*" in the plural answers to the term "*heir*" in the singular in England, and that all the reasonings that are applicable to the word "*heir*" in the singular there, hold with equal strength and propriety, when applied to the plural termination "*heirs*" here. We will not stop to examine at present the soundness of this logic. It will be time enough to do this when a parallel case occurs.

There is no difference, said the court in Virginia in *Bradley vs. Mosby*, (3 *Call*, 57,) between *heir* in the singular number, and heirs; since one and the same person takes in both instances, in case of land, in England. In *Archer's* case, the word "*heir*," it is true, was in the singular number, but it was preceded by the word "*next*," and what is more important, words of limitation were engrafted on it, which made the next heir the root of a new inheritance, the terminus or stock of a new descent, by reference to whom the future succession was to be regulated. It is contended, that inasmuch as the testator gave an estate in fee to his sons, and used proper language to that end, that therefore he understood the import of the terms introduced into his will, and that he could not have intended his daughters to take the same estate with his sons—in the bequests to whom, different phraseology altogether is employed. This is, no doubt, true; but the inference deduced from it would seem to operate the other way. In the legacies to his daughters, if professional ingenuity had been taxed to the utmost, more apt words could not have been selected, to create a limitation in indefinite succession. And there is no desire more deeply seated in the human breast, than the

preserve the property we have acquired in the family that shall descend from our loins; consequently the natural presumption would be, that such was the intention of Leonard Fretwell. Be that as it may, such, and such only, is the legal operation of the words used by him; and although his purpose may be so far counteracted, as that his daughters will take a greater estate than he intended, still we are consoled by the reflection that this is but accomplishing the paramount policy of the supreme authority in this State, in providing, in 1821, that all bequests of property, expressed in such terms as would have passed an estate tail by the Statute of Westminster, commonly called the *statute de donis conditionalibus*, shall be construed to vest an absolute fee in the first taker. Mr. Justice Blackstone, in delivering judgment in the Exchequer Chamber, in the great case of *Perrin et al. vs. Blake*, states, that all the cases that had occurred from the Statute of Wills to that time, (a period of about two centuries,) in which *heirs of the body* had been construed to be words of purchase, were reducible to these four heads: either where no estate of freehold is given to the ancestor; or where no estate of inheritance is given to the heir; or where other explanatory words are immediately subjoined to the former; or, lastly, where a new inheritance is grafted on the heirs of the body: none of which, he adds, was the case then before the court; and none of which, we may add, is the present case. We have thus glanced, hurriedly, at the arguments and leading cases presented with so much zeal and ability by counsel for the plaintiff. We feel the full force of the learned counsel's general reasoning upon this question. We doubt not that the intentions of numerous testators have been defeated, by supposing, that they proposed doing an illegal act, which it was impossible for them to do. We have, with pleasure, discovered the tendency in the judicial mind, both in England and in this country, to relax the sternness and severity of the rule. We are prepared, although in our *judicial infancy*, to advance to the front rank in this warfare of principle against precedent. Beyond this we dare not go. Judges cannot alter a law of property, established for centuries, to suit their notions. The exercise of such a power would be arbitrary and destructive of all law. Their business is to declare what the law is, and not what it ought to be. That the gift of slaves to A, *for life, and to the heirs of her body forever, without* an other word of explanation from the testator, *must* be considered words of *limitation*, and not of *purchase*, is an inflexible rule, too strong and thoroughly established by all that is venerable in authority, to be abolished by any power short of that which enacts the law. To deny its binding efficacy in the present instance, would be to frame a will for the testator, and not to expound the one which he actually made.

"To disregard rules of interpretation," (says Chief Justice Dorsey, of Maryland,) "sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretence that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only frustrate the great landmarks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequences."—

4 *Harris and Johns*. 435. Says Judge Cheves, of South Carolina, "It is of the utmost importance that rules, when established, should not be taken from, whether they are wise in themselves or not. In an en-

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larged view of the duties and functions of judicial tribunals, the determination of the particular cases which they adjudicate, is altogether of minor importance. In the more remote and remote of a case is keeping a thousand of the like kind out of court, and settling the rules of property, is discovered its greatest value. The community generally, and the bar especially, ought to be able to know beforehand what will be the decision of the court on any question which may occur, and which is not new or anomalous. If this is true, it is at least it ought to be in vain to argue to a judicial tribunal on a question like this, that any rule heretofore laid down for the government of the construction of wills, should be departed from because of particular hardships, or of *various views of policy*. Where nothing is established, they may have their influence, and not otherwise. But the leading rule on this subject, is one which under our institutions should be cherished—I mean that which declares that perpetuities in the limitation of estates should be prevented. It is a highly useful auxiliary to that great provision of our Constitution, the abolition of the rights of primogeniture.—1 *Nott and McCord, Rep.* 71, 72. It is needless to add, that in the sound conservative sentiments so strenuously set forth by these eminent jurists, this court entirely concurs. Believing, therefore, that the law is with the defendant in error, we affirm with cost, the judgment of the Circuit Court.

No. 18.—ISAAC BRYAN and ELIJAH ROBERTS vs. THE JUSTICES OF THE INFERIOR COURT of Scriven County.

From Scriven Superior Court.

The transcript of the record in the above cause, was transmitted to and received by the clerk of this court, in due time, and was regularly docketed, before the meeting of the court at the present term; but no assignment of errors was filed in the clerk's office, either *on*, or *before* the first day of the term, in conformity with the XXIII. Rule of this court.

On the *second* day of the term, an assignment of errors was prepared, and tendered the opposing counsel.

STARNES, for defendants in error, refused to join issue, and now moves to dismiss the writ under the above rule of court.

Whereupon the court sustained the motion, and the writ of error was accordingly dismissed, and the case stricken from the docket.

No. 19.—ZACHARIAH M. WINKLER vs. AMOS SCUDDER.

By the common law of England, of force in this State, under our adopting statute of February, 1734, all *sane* persons are competent to testify, unless *interested or infamous*.

The maker of a note (who is released) is a competent witness to prove usury in its consideration, in a suit by an endorsee against an endorser.

In a plea of usury, the *amount* of the original loan, and the *time* when it was negotiated, as well as the *amount* of usury taken and reserved, are material facts.

It is the right of a plaintiff to demur, at law, to a plea, for want of sufficient fullness, before issue joined upon it before the jury. The practice under our judiciary act of 1799, has been to demur orally—not formally, and in writing, as in England—nor is the judgment of the court upon such demurrer formally pronounced and recorded with us, as in the English courts.

This was an action brought against the defendant, as endorser of a promissory note made by Joseph R. Thompson, dated 7th of January, 1842, and due 61 days thereafter, for \$600. The defendant pleaded that he had endorsed this note for the accommodation of the maker, and that it was given in renewal of a former note made by Thompson, and endorsed by defendant for his (Thompson's) accommodation; that Thompson delivered the original note, and those successively taken in renewal, including the one in suit, to the plaintiff; and that the plaintiff took and received upon the original note, and upon each succeeding note in renewal, three per cent. per month, interest, and that the interest so received amounted to the sum of \$400.

At February Term, 1846, this cause was tried before Judge Fleming, in the Superior court of Chatham county. The note sued on, with the defendant's endorsement thereon, having been read to the jury in evidence, the plaintiff's attorneys closed their case.

On the part of the defendant, Joseph R. Thompson, the maker of said note, was then offered as a *witness* for the purpose of proving the facts alleged in the plea, and that he passed the note to the plaintiff upon the usurious consideration alleged. At the same time, a general release from the defendant to the witness, of all causes of action whatever, and also the discharge and certificate in bankruptcy of the witness, were tendered in evidence, to obviate all objections to the witness, on the score of interest.

The plaintiff's counsel objected to the competency of the witness to prove the usury, on the ground that a party to a negotiable instrument shall not be permitted to invalidate it, or to show that it had a taint when it passed out of his hands; and contended, that even if the rule of *Walton & Shelly* should be confined to *the case of a note in the hands of an innocent holder*, yet, that as the note in this case imported consideration, *prima facie*, and there was no evidence yet to the contrary, and that even admitting that Thompson could be a competent witness, when it had been proved, *aliunde*, that the plaintiff was not an innocent holder, yet as the witness was rendered incompetent by the *aliunde* proof, he could not be admitted either on the *voire-dire*, or in *chief*, to remove it; that a witness

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cannot make way for his testimony in chief, by taking his case out of a rule which, *prima facie*, furnished a valid objection to it.

Which objection of the plaintiff's counsel was overruled by the court below, and Thompson was admitted, and gave testimony in said cause, proving the said note to have been infected with usury when he passed it to the plaintiff. To which decision of the court below the plaintiff excepted.

After closing the testimony on the part of the defendant, it appeared that there was a variance between the defendant's proof and his plea; that neither of the pleas corresponded with the amount or the time of payment of the usury proven, and on that account the plaintiff's counsel insisted that the said testimony should be ruled out, and moved the court to that effect, which motion the court below overruled, and the plaintiff's counsel excepted.

The plaintiff's attorneys then argued to the jury, that even under the testimony of Thompson, the plaintiff was entitled to recover the principal of said note; that the payments made were on account of interest, and not of principal; that although neither the witness, nor Scudder, the defendant, could have been made to pay said usurious interest, nor could the legal interest have been recoverable at law; yet, inasmuch as it had been voluntarily paid, neither Thompson, the witness, nor Scudder, the defendant, could recover it back. That the defendant could not certainly recover it back, inasmuch as he had never paid it. That it could not be allowed that Scudder, the defendant, should have the right to the deduction in this case, and then that Thompson, the witness, or his official assignee, could also recover it back. And asked the court below so to charge the jury. Which was refused; but left to the jury to say what part of the principal sum had been paid. And the jury deducted all the sums paid by the witness, Thompson, for interest, from the principal sum, and only rendered a verdict for the plaintiff for the balance of the principal. To all which the plaintiff's counsel excepted.

And now, in the Supreme Court, the plaintiff assigns as errors in law, the said decisions and charge of the court below, and prays judgment, &c.

R. M. CHARLTON and L. S. DE LYON, for plaintiff in error.

Mr. De Lyon made the opening argument in behalf of the plaintiff.

WILLIAM LAW and MULFORD MARSH, for defendant.

Mr. MARSH, for defendant, argued as follows:

This was an action tried in Chatham Superior Court, January Term, 1846, before Judge Fleming, founded upon a note endorsed for Joseph R. Thompson, of which the following is a copy:

\$600

Savannah, 7th May, 1842.

Sixty-one days after date, I promise to pay to the order of Amos Scudder, Six Hundred Dollars, for value received.

Cr. the Drawer,

J. R. THOMPSON.

A. SCUDDER.

Endorsed Amos Scudder.

The defendant pleaded that he had endorsed this note for the accommodation of Joseph R. Thompson, and that this note was given in renewal of a former note, made by Thompson and endorsed by defendant for Thompson's accommodation—that Thompson transferred the said original note and those in renewal of said note, including the one in suit, to the plaintiff, and that the plaintiff took and received upon the original note and upon each note in renewal, three per cent. per month interest, and that the interest so received amounted to the sum of four hundred dollars, and that the plaintiff could only recover the balance of the principal—the whole interest being forfeited.

And in support of his several pleas, he offered the maker, Joseph R. Thompson, to prove that defendant endorsed the note for the accommodation of Thompson, and also to prove the usury, as pleaded.

Plaintiff's counsel objected to the competency of Thompson as a witness, on the ground that a party to a negotiable note should not be received as a witness, to prove that the note which he put in circulation was tainted with fraud in his hands, when he passed it away; the court overruled the objection, and plaintiff's counsel excepted, and relied on the cases *Walton vs. Shelly*, 1 Rep. 296; *Bank U. S. vs. Dunn*, 6 Peters Rep., 51; and a few other decisions in the Supreme Court, U. S. The last in the case of *Henderson vs. Anderson*, 3 Howard Rep., 73, affirming the case of *Walton and Shelly* as the law of that court.

The case of *Churchill vs. Suter*, 4 Mass. Rep., 156; *Winton vs. Saidler*, 3 John. Cases, 185, and some few other authorities.

The case of *Walton vs. Shelly* established an innovation on the common law; at common law every person not a party to a case, nor interested, nor infamous, is a competent witness.—3 Bl. Com., 369; 1 Phil. Ev., 18; 1 Greenleaf on Ev., 376.

This maxim of the civil law adopted by Lord Mansfield in the case of *Walton and Shelly* does not apply—"nemo allegans suam turpitudinem audiendus est;" viz: no man setting forth his own depravity is to be heard.

Has the witness offered committed any act of depravity? He had violated no laws. The plaintiff had committed the act of depravity, he had violated the law by taking usury, and yet asks that the witness's mouth may be sealed to hide his own depravity.

Even the principle of *particeps criminis* does not apply, for witness could have sued for and recovered back the usury if he had paid the note, which could not have been done had he been *particeps criminis*.—5 Law Lib. Com. on Usury, 80 and 81, (see 6 East; 241 Cowper, 200, 790;) *Clarke vs. Shee*.

But this rule as laid down in *Walton and Shelly* in 1786 was overruled, in the case of *Jordaine vs. Lashbrook*, 7 Term Rep. 604, in 1798, and from that day to this it has never been the rule in England, and long since then, they have by statutes made all persons competent witness unless parties to the case.—Statutes 6 and 7 Vict. C. 85, Sec. 1; Arch. Ni. P. Law Lib., July No. 1845, page 29, and see page 30.

This rule, established by Lord Mansfield, the great commercial lawyer and Judge, for the benefit of commerce and commercial paper, lived a sickly life of only 12 years, and since then in that great commercial country, the courts have adhered to the common law, enlarged by Statutes of 6 and 7 Vict., so that no person not a party to the case is excluded on the ground of incompetency, and yet our court is asked to adopt this repudiated rule of Lord Mansfield.

In some of the States the rule of *Walton and Shelly* was early adopted.

It was in New York in 1802, in the case of *Winton and Saidler*. Justices Kent and Radcliff holding the witness incompetent.—3 John. Ga. 185.

This State is the greatest commercial State in the Union, and yet we find they have entirely repudiated the rule of *Walton and Shelly*, and declare it not law.—*Hill vs. Davis*, 20 John Rep., 285; *Potwell vs. Waters*, 17 John Rep., 176; *Barret*

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vs. Snowden, 5 *Wend.*, 185; *Williams vs. Walbridge*, 3 *Wend.* 415; *Bank of Utica vs. Hilliard*, 5 *Cowen*, 153; *Stafford vs. Rice*, 5 *Cowen*, 23; *Starkweather vs. Matthews et al.* 2 *Hill Rep.*, 131. The maker of an accommodation note was admitted in behalf of his endorsers, on being released from costs, to prove usury. This was in 1841.

In the case under consideration the witness was released not only from the costs, but from the debt by defendant, and his discharge under the Bankrupt Act of 1841, was also in evidence.

In Massachusetts, a State perhaps nearly equal to New York in commerce, the courts have also repudiated the rule, unless the note be in the hands of an innocent bona fide holder.—*Fox et al. Admr. vs. Whitney Admr.*, 16 *Mass.* 118.

Vanshaack vs. Stafford, 12 *Peck*, 565; Case directly in point. In this case, the accommodation endorser was sued, and the maker held competent to prove usury between the plaintiff and maker, from whom plaintiff received the note.

In South Carolina the rule of *Jordaine vs. Lashbrook* prevails—3 *McCord*, 71; *Wright vs. Packard*; *Smith vs. Admr. Cherry*, 1 *Hill Rep.* 148; *Smith vs. Dow*, *Mil. Con. Rep.*, 277. In New Jersey the same rule prevails, and to prove usury. *Freeman vs. Brittin*, 2 *Harrison Rep.*, 192. So in Virginia—*Taylor vs. Beck*, 3 *Rand*, 316; (2 *Cow.*, *Phil. on Ev.*, Note 78, page 78.) And in Vermont—*Same note*, 2 *Aik. Rep.*, 138. Connecticut—*Same note*, 1 *Conn. Rep.*, 260. Maryland—*Same note*, 3 *Har. and John.*, 172; 4 *Har. and John.*, 283. Kentucky—*Same note*, 1 *Munroe*, 23.

Thus we see the courts of these States having great commercial interest, repudiating this obsolete rule of Walton and Shelly. Obsolete, at least, in the court that first adopted it; and yet this court is asked to hold it to be the law of Georgia.

But this question is settled by the law-making power in Georgia. By the Act of 1784, the common law and statute law of England were adopted, such as were in force on the 14th May, 1776.

The common law, as it was known and recognized by the courts of Great Britain on the 14th May, 1776, held all persons, not parties, nor interested, nor infamous, competent witnesses, as we have seen.—3 *Blk. Com.* 369; 1 *Phil. Ev.* 18; 1 *Greenleaf*, 376.

And this being adopted by the Act of 1784, remains the law of Georgia, unless repealed or otherwise altered by the Legislature.—*Prin. Dig.*, 570.

The rule in *Walton vs. Shelly* was made in 1786, two years after the adopting statute—and was overruled in the case of *Jordaine vs. Lashbrooke* in 1798.

So that the case of *Walton vs. Shelly* never was authority in this State, and since our adopting statute, no court in this State can adopt it without violating the statute of 1784. And also the 1st Sec. 1 Art. Con. of this State—which confines all legislative powers to the Legislature.

And such was the decision of the Judges in Convention in the case of *Slack vs. Moss*, *Dudley's Rep.* 167.

And such I apprehend has been the current of decisions in this State.

See the case of *Wendell vs. George*, by Judge Berrien.—*R. M. Charleton's Report*, 51.

But the counsel for plaintiff says that the evidence should have been ruled out under the pleadings. The general issue denied what the plaintiff alleged in his declaration.

The plaintiff declared that the defendant transferred the note to plaintiff, in the usual course of business, and for a valuable consideration. Defendant by the general issue denied that, and proved it by the evidence of Thompson, and therefore disproved plaintiff's case.

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And by the general plea of usury, the defendant set forth the whole transaction, the usury taken, and from whom taken, and for what time taken, fully and distinctly enough to advise the plaintiff of the defence which at common law may be given in evidence under the general issue.—5 *Law Lib. Com. on usury* 76.

The answer fully, plainly and distinctly sets forth usury, names the unlawful interest taken, 3 *per cent. per month*, &c., and completely puts the plaintiff upon full notice of the nature of the defence. And that is what our statute requires, that the plaintiff may not be taken by surprise.

The general plea of usury is good except on special demurrer.—5 *Law Lib.*, 77.

And even under the rule of *Walton vs. Shelly*, Thompson was competent to prove all that happened while the note was in his hands, because it then had no taint. Nor did it receive any from him, but from plaintiff.—2 *Greenleaf on Ev.*; *Roscoe on Civ. E.* 173.

The decision of the court in admitting Thompson's testimony was clearly right, and he disproved the plaintiff's statements in his declaration, proved that plaintiff did not receive the note from defendant for a valuable consideration, nor in the usual course of trade, and he fully proved the usury as alleged in defendant's plea, and the verdict is right both according to law and evidence.

In an application for a new trial which always addresses itself to the sound discretion of the court, if upon the whole case justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial. Justice Story, in the case of *McLanahan et al. vs. the Universal Insurance Co.*, 1 *Peters' Rep.* 183.

In this case full and ample justice has been done. Plaintiff has a verdict for all he is entitled to under our laws, and surely this court will not, by requiring from a security a strictness in pleading, with which, from a want of knowledge of the facts, he cannot comply, compel him to pay usury extorted from the principal, and thus aid the usurer in violating the law,

Securities always have a favorable standing in court, and are entitled to all the privileges of the principal, and may plead usury or make any defence the principal can.—5 *Law Lib. Com. on usury*, 76.

Bank U. S. vs. Winston Exr., 2 *Brockenborough*, 252; *Theobald on Security*, 253, 254, (see *Cooper*, 61.) This doctrine is laid down in the case of *Wright vs. Morley*, 11 *Ves. page* 22, by Sir Wm. Grant, Master of the Rolls.

The plaintiff could have denied the plea under his oath and have been a witness; this he refused, and we submit if this be not an admission of its truth.—1 *Phil. Ev.* 107.

Our statute only requires such a plea as will fully advise the plaintiff of the nature of the defence. Surely this was done; and the defendant may rely on all his pleas.

We think we have fully sustained the following points :

1st. That a party to a negotiable note is a competent witness to prove usury in the hands of the person taking usury—he not being a *bona fide* holder.

2d. That in this case plaintiff received the original note and those in renewal of such note, including the one in suit, from the witness, (Thompson the maker,) and upon each note took from Thompson 3 *per cent. per month* interest, contrary to law. And that Thompson is a competent witness to prove these facts.

3d. That the pleading on the part of the defendant fully notifies the plaintiff of the nature of the defence, so that he could not be taken by surprise.

4th. That full and ample justice has been done the plaintiff in this case by the verdict, which gives him all he is entitled to by law—and that this court ought not to grant a new trial.

WM. LAW for defendant in error.

By the established rule of evidence at common law, all persons are *competent* to give evidence unless *interested* or *infamous*.

Interest and *infamy* are, in other words, exceptions to the general rule, that all persons of *sane* mind are competent to testify.—1 *Phil.* 18.

To these two exceptions, another was added in England in the year 1786, viz: that a party to a negotiable security, or instrument, could not be a witness to impeach its validity.

This exception was first established in the case of *Walton and Shelly*, (1 *Tm. Rep.* 296,) and originated in an idea that it was to *assist commerce and discourage fraud*.—See the case and 4 *Mass. Rep.* 156.

It is obvious here to remark, that this exception did not exist in England, when the common law was adopted in Georgia, but was introduced twenty years after. Hence, there is no *obligation* upon this court to adopt it; and it should not be adopted unless strongly commended by its obvious propriety and necessity, for the very reason that it is an *exception* to a general rule.

It is obvious further to remark, that this *same* exception was rejected and exploded in England within ten years after its introduction, and questioned in the earliest succeeding case.—See *Bent vs. Baker*, 3 *Tm. Rep.*; *Jordaine and Lashbrooke*, 7 *Tm. Rep.*

But it is said to be an exception designed to *assist commerce and discourage fraud*; and yet England, where the exception was so early rejected, is the most *commercial* nation in the world; and the common law of England abhors *fraud* in every form.

It would be strange, that in such a country, and with such a common law, an exception standing on the ground on which this was made to repose by its distinguished author, should so immediately have been questioned, and so speedily exploded, if its introduction had not been in clear violation of existing law, and the principle on which it was rested found to be fallacious in practice. The truth is, that its application, instead of assisting commerce by discouraging fraud, was found to conceal and disguise fraud by withholding the only witnesses who in the nature of such transactions could disclose it.—See 18 *John. Rep.* 167.

The exception never was in force in Georgia,—the general rule, without the exception, was the law of England when that law was adopted. It is a hazardous undertaking on the part of the Judiciary to legislate; it becomes still more so to do it, in opposition to the lights of experience and the obvious tendency of judicial wisdom in America as well as England.

More than twelve years ago, the exception established in *Walton and Shelly*, was considered in convention by the ten judges of Georgia then on the bench; and the authority of that case deliberately and considerably rejected; and the exception it established declared not to be law.—See *Slack vs. Moss*, *Dudly, Rep.* 161.

The decision in that case was prepared by the late Judge Crawford. The reasoning was his—but the rejection of *Walton and Shelly* was in accordance with the opinion of all the Judges attending the Convention.

It is not now understood that *Walton and Shelly* is recognized in any Circuit in the State, save what inclinations may have been indicated during the trial of cases in this circuit.

It is to be remembered, too, that *Slack and Moss* was decided at a time when the exception in *Walton and Shelly* was supported by its unqualified adoption in some of the large commercial States of the Union, with the most enlightened Judiciary; particularly New York and Massachusetts. The Judiciary of both these States have greatly receded from their former views on this subject. New York has denied the authority of *Walton and Shelly*. Massachusetts has great

qualified it, and is fast verging to its explosion. Indeed, in England and in this country, the most direct tendency is to let all objections to testimony go to the credit, and to limit the rule of incompetency within the narrowest points. By the English Statute of William IV., a most important legislative indication is given on this subject.

It would be strange, if, when everywhere else this *exception* in Walton and Shelly was either rejected or exploded, or being exploded by its gradual limitations, that we in Georgia, in opposition to former opinion, should be reversing the order of things by its adoption.

It will be conceded that in England, the rule in Walton and Shelly has never been recognized as law since the case of Jordaine and Lashbrooke.

When its paternal ancestry have rejected it as an unworthy and spurious offspring, shall we adopt the bantling, and like the Dutchman adhere to his ill-shapen four-cornered roofed house, in the midst of beauteous and splendid specimens of architecture?

I have alluded to the tendency of the decisions in our own country;—let us examine them:

In Winton vs. Saidler, 3 *John. Cas.* 185, the New York Court fully adopted the rule in Walton and Shelly.

The rule seems to have been continued and unbroken, or modified down to the case of Mann and Swan in 14 *John. Rep.* 270, where we see a most severe application of the rule.

It underwent some modification in Skelding vs. Warren, 15 *John. Rep.* 270, and 16 *John.* 70. It was further shaken and modified in Powell vs. Waters, 17 *John.* 176; and McFadden vs. Maxwell, 17 *John.* 188. And the important distinction was taken and established that the rule did not apply when the plaintiff in the action was himself the *usurer* or a *party to the fraud*.

And in Myers vs. Palmer, in an action against the 1st endorser, the maker and 2d endorser were held competent to prove that the note was filled up for a greater sum than was intended, the court using the strong language, "*that the reason and policy of the rule was to protect bona fide holders, &c.*" Here the party who asks its benefit is the very person who committed the fraud. It would be a misapplication and abuse of the rule to extend it to such a case."—18 *John. Rep.* 167.

I ask the court to pause and consider here upon the case at bar. Winkler, the plaintiff, is the *usurer*—he committed the fraud upon the law—he took advantage of the pecuniary necessities of the maker, and after the note had been endorsed by the defendant for the maker's accommodation, and delivered to him, (the maker,) he discounted it for usury.

Is he that *bona fide* holder for whose protection the rule was introduced? or, in the expressive language of the New York court, is not its application to him an *abuse of the rule*? Winkler is precisely within the qualification of the rule made in that case in New York.

In Tutill vs. Davis, 20 *John.* 287, the endorsee was admitted to prove in a suit against the maker, that the note was given to take up two other notes on which usury had been received; and thus the rule was virtually abolished.

Stafford vs. Rice, 5 *Coven* 23, expressly overruled Winton and Saidler, and with it Walton and Shelly, and declared that they were not law. More strong yet is the case of the *Utica Bank vs. Hilliard*, 5 *Coven*, 153. See also 8 *Coven*, 669; 3 *Wend.* 415. The same adoption of the rule in Walton and Shelly marked the course of the earlier decisions in Massachusetts, until we arrive at the case of Fox and Whitney, 16 *Mass. Rep.* 118, where the same distinction is taken, and the contest being between the original parties, and not an innocent *bona fide* holder, the rule was relaxed, and the witness admitted.

And on a motion for new trial in the case of *Knight vs. Putnam*, 3 *Pick.* 184,

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Judge Wilde says *Manning vs. Wheatland*, 10 Mass., has been questioned. The plaintiff, he says, was the guilty party (the usurer); no deception was, therefore, practiced on him. The truth was that *Manning vs. Wheatland* was in effect overruled by *Fox vs. Whitney*. See Mr. Cowen's note to Phillips, 2 vol. 76. But in *Van Schaack vs. Stafford*, 12 Pick. 565, the maker was held a competent witness, under precisely the same circumstances with the case at bar. In Virginia the rule of Walton and Shelly is rejected. See 1 Hen. and Munf. 154; 3 Rand. 316. This last case is worthy of perusal. In Vermont the rule is rejected. *Nichols vs. Holgate*, 2 Aik. 138, cited Cowen's note, p. 79. In Connecticut the earlier decisions followed the lead of their neighbors; but in *Townsend vs. Bush*, 1 Conn. Rep. 260, Walton and Shelly was rejected, and *Jordaine vs. Lashbrooke* declared to be sound law. I have this reporter, and can furnish Randolph. In South Carolina the doctrine in Walton and Shelly is entirely exploded.—See the cases collected in 2 Cowen's Notes, p. 80. In Maryland the rule is also rejected.—See 3 Har. and John. 172; 4 Har. and John. 283. I can furnish these authorities. So in Tennessee, 2 Yerger 35. So in Kentucky.—See Cowen's Notes, 80. So in New Jersey, 2 Harrison 192. In Louisiana the rule is said to be of modern date, and not settled.—5 Martin 130, cited Cowen 81. In Pennsylvania, New Hampshire and Maine, and perhaps Mississippi, Walton and Shelly seems to have been adopted. In North Carolina rejected.—3 Murphy 151. So too in Alabama.—1 Stew. 199; 9 Porter 226. In Ohio, rule undecided.

Thus stands the question in the State courts.

This brings me to the consideration of the decisions of the Supreme Court of the United States.

The authority of that court is entitled to great weight; yet its decisions are not obligatory upon this court, and will not command its blind obedience, but are to be weighed and scrutinized upon principle; and then, with due allowance to the acknowledged weight of its authority, they are to be followed or resisted according to the force of the reasoning by which it is supported, and the weight of the authorities upon which it rests and relies.

¹ The two cases of the *Bank of the United States vs. Dunn*, and that of the *Bank of the Metropolis vs. Jones*, in 6 Peters 51, and 8 Peters 12, stand upon precisely the same ground. And they involved three points, viz.: 1st. Whether a party to a negotiable instrument was competent to invalidate it? 2d. Whether parol evidence could be received to vary or contradict a written contract? 3d. That the officers of the bank had no authority to make such contract as the witnesses in each case testified to. The court affirm the negative of the first proposition, upon the authority of Walton and Shelly. But the testimony of Car and Blake did not go to the extent of invalidating the instrument, but merely to prove a parol agreement, tending to release the endorsers from risk, in contradiction of the obligation imposed by the contract of endorsement. This raised the second point, which principally attracted the attention of the court, and which, equally with the third, was decisive of the case.

It will be seen, therefore, that there was enough in the cases for the decision without touching the first question; and that, indeed, as the first was not so obviously embraced in the facts proved by the witnesses, what was said by the court on that point has rather been considered as a dictum than the ground of the decision in the case.

Upon the point the decision is brief and unsatisfactory. The court first say that the witness is not incompetent, because his name was not endorsed on the bill.—See page 57. It then says the case of Walton and Shelly is still held to be law. I ask when and where is it held to be law?

It was expressly overruled by the Judges in Bank, in England, in *Jordaine and Lashbrooke*.—7 Im. Rep. It has never since been recognized in England. The decisions of the Supreme Court were made twelve and thirteen years ago.

they allude to the earlier decisions of New York and Massachusetts? We have shown that they have been revised and overruled.

It is now law only in Pennsylvania, New Hampshire and Maine.

How imperfectly and superficially was this point considered by the Supreme Court, and the dictum announced when they refer to the case in 7 *Tm. Rep.*, 60, which allows the borrower in an action for usury, to be a witness, and take no notice of Jordaine and Lashbrooke, reported in the same volume, in which the very point they affirmed is denied, and Walton and Shelly expressly and by name overruled.

It is manifest the court did not mean to decide the case so much upon the first point as the second and third, because they say, at page 60 of 6 *Peters*, the evidence should have been overruled; or the court should have instructed the jury that the facts proved were not sufficient in law to release the liability of the endorser. Demonstrating the fact that they rested the case upon the insufficiency of the parol evidence to contradict the written contract.

That this view of those decisions has been taken by distinguished lawyers and jurists, is apparent from what the learned annotators to *Bayley on Bills*, 587, say, viz: that the question must still be considered an open one in that court. These gentlemen are Willard Philipps, the distinguished author of the great treatise on Insurance, and Judge Sewall, of Massachusetts.

When the brevity and paucity of the two decisions on a point of so much importance affecting a rule of evidence, with reference to no authority but an overruled case, in the midst, too, of so many well considered and elaborately learned investigations of the question to which these decisions stand opposed, with no notice taken of the learning on the subject—I say, when these considerations are weighed, who can fail to arrive at the conclusion that the Supreme Court rested the case on the other and undoubted points of the case, without giving to this particular one the consideration and examination which it would have received had the case stood alone on that point? And surely such decisions can never prevail against the accumulated weight of authority the other way.

But the Supreme Court have reiterated the dictum in 11 *Peters* and 12 *Peters*. It is still but a dictum, for in neither of those cases did the true question arise. The instruments in these cases were not *negotiable* instruments, and the court simply allude to its former decisions with the qualification that it was confined to negotiable instruments.

In the case of 11 *Peters*, the court trace the principle in England from Walton and Shelly to its explosion in Jordaine and Lashbrooke, which they admit is still followed in England. Yet, in the case in 6 *Peters*, in which they decided the point, they affirm Walton and Shelly to be still law, without noticing Jordaine and Lashbrooke. If anything were wanting to show the superficial character of that decision, we have it here.

The truth is, the question has never been well considered by that court. They gave to it but little reflection and examination in the two first cases, because they had undoubted points to rest on; and in the last they have only referred to the decision as having been made, because the point did not apply to these last cases.

In these last cases the Supreme Court itself rejects to a certain extent Walton and Shelly, which extended the rule to all instruments, and followed Bent and Baker, in 3 *Tm. Rep.*, which limited it to negotiable instruments. And thus that court repudiated the foundation on which Lord Mansfield had placed it, viz: *Nemo al-legans suam turpitudinem audiendus est*; and adopted the more sensible rule of the policy of the law in protecting an innocent holder of a negotiable paper. The qualification necessarily produces this result, since the maxim of the civil law applies to every species of instruments.

do not doubt, when that court shall be called on again *directly* to decide the case as the entire or alone ground of the case, the rule will undergo further

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modification and be expressly restricted to innocent parties, holders, and finally exploded as it has been in New York, Massachusetts and Connecticut, overruling their own former adjudications.

This is the tendency of jurisprudence throughout the world, where the common law is known.

But as the restriction of the rule by the Supreme Court, in 11 *Peters*, to negotiable securities, and consequently the rejection of the civil law maxim as its basis, becomes all important to the argument I am about to raise, I ask the particular attention of the court to what the Supreme Court say at page 95, 11 *Peters*:

"The principle settled by the court, goes to the exclusion of such evidence only in regard to negotiable instruments upon the ground of the currency given to them by the name of the witness called to impeach their validity."

In other words, you have certified to the validity of this paper by putting your name on it; an innocent holder has trusted to that assurance, and you shall not impeach it.

Or in the yet clearer language of the court, in 18 *Johns.*, 167; the reason and policy of the rule is to protect *bona fide* holders of negotiable paper, honestly received in course of business.

This is the obvious qualification of the rule by the Supreme Court in 11 *Peters*.

But as my learned opponent has, to my surprise, referred, as he says, to the decisions of the Supreme Court, not to establish the rule in Walton and Shelly, but to show that that court put it on the civil law maxim or ground, let me apply a test for the purpose of ascertaining beyond controversy, upon what ground that court does put the rule. The civil law applied the maxim *nemo allegans, &c.*, to all instruments; Walton and Shelly does the same; but the Supreme Court expressly limit it to negotiable instruments. Now, the inquiry is, why this limitation? As between the original parties, there is no reason why the rule should not be as applicable to a bond as a note, or bill of exchange; but as notes and bills of exchange are commercial papers made to circulate and pass in business from holder to holder, the limitation of the rule, and confining its application alone to such instruments, indisputably proves that its object was the protection of *bona fide* holders for valuable consideration, without notice. The very restriction, therefore, put on the rule by the Supreme Court, necessarily involves as its basis the policy of the law in protecting innocent holders; and as certainly rejects the more enlarged foundation of the civil law, and on which Lord Mansfield had put it.

I presume, therefore, whatever the language of the Supreme Court may have been, there can be no mistaking their meaning when they say they exclude "such evidence only in regard to negotiable instruments," &c.

The corollary deduced from the limitation is as irresistible as the language is plain and certain in which that limitation is couched.

I have been thus particular on this point, because, if we have arrived at a sensible and true understanding of the rule as adopted by the Supreme Court, and the American courts generally, where the rule has, or now obtains, then we present the following argument, which we think ought to be conclusive of the question in the courts of Georgia.

Our argument is, that under the laws of Georgia, the rights of third parties, innocent *bona fide* holders, cannot be involved in this question, nor in the slightest degree affected by its decision.

That proposition being established, the prop which supports the rule according to the American cases, will have been removed from beneath it—and *cessante ratione, cessat et ipsa lex*.

It will, of course, be perceived that our argument is confined to the application of the rule to the case at bar,—to a case in which the defence is *usury*, and the witness offered to prove *usury*.

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Our proposition is, that under the Usury Act of Georgia, of 1822, (*Prin. Dig.* 295,) the innocent *bona fide* holder of a bill or note may recover the whole amount of the face of the paper, principal and interest, although usury may have infused itself into the veins of the contract, provided the holder did not know of it when he took the bill.

The Act of our Legislature declares that the usurious contract shall not be void, and contents itself with denouncing, as a penalty upon the usurer, the forfeiture of the interest. It is upon the guilty party, and him alone, that this penalty falls.

To make this plain, I proceed to illustrate the argument.

By the English statute, and by those of many of the States, the usurious contract is declared to be null and void. When the question came up in England, whether an innocent holder could recover on such a contract, the judges struggled to relieve him, but they declared that the words of the statute were *too strong*,—the contract being declared *void*, there was nothing for him to recover on.—See *Lowe vs. Waller*, *Doug.* 736. Lord Mansfield said he was constrained to the decision by *Bowyer vs. Brampton*, 2 *Strange*, 1155, on the gaming statute.

This decision in England was followed by the statute 58, George III., which declared that no bill or note, or contract usurious, shall be void in the hands of an innocent holder for valuable consideration without notice of the usury.

In the mean time the Judges availed themselves, in behalf of innocent parties, of every ground by which they could escape the mandate of the former statute. Thus in *Ellis vs. Warnes*, *Cro. Jac.* 32, (which I have,) they decided that a security given by the borrower to a person *not privy* to the usurious agreement, and to whom the lender is *indebted* in so much money, shall not be avoided by the usury.

So, in *Cro. Eliz.* 642, where a surety joins in a security, and a counter security is given by the principal, such counter security is good, notwithstanding the former security was usurious.

So, if a security tainted with usury be given up in the hands of a third party, for valuable consideration, without notice, and a new security taken, the latter is good.—8 *Im. Rep.* 390.

So, if a bill or note usurious be endorsed for a *valuable consideration* to one *ignorant* of the *usury*, it is good between the endorsee and endorser, although void between the endorsee and drawer, or maker—because the endorsement is a new contract.—1 *Salk.* 125, 133, 344; *Ord on Usury*, 108–9.

These authorities will suffice to show how the courts in England struggled for innocent parties, before the 58, George III., and against the strong language of the prior statutes, declaring the contract *void*.

In New York, before the revised statutes, the contract for usury was void, with no saving to innocent holders. Yet Chancellor Kent, (in 10 *John. Rep.* 197–8,) reviewing the course of the English cases, protected an innocent purchaser at public sale, under an usurious mortgage.

In Virginia, the usurious contract is also void. Yet Chief Justice Marshall held, that where an agent borrowed money from his principal, in that State, at usurious interest, he would not let the agent benefit, and decreed payment of principal and lawful interest.—1 *Brock. Rep.* 115; *Short vs. Skipwith*.

But we are not without direct authority on this point.—See *Bailey on Bills*, 573, 574; *Gould vs. Armstrong*, 2 *Hall*, 266; *Vallet vs. Parker*, 6 *Wend.* 615; 3 *Cains*, 279; *City Bank, New York, vs. Barnard*; 1 *Hill*, 70; *Chitty on Bills*, 81, 82, *old Ed.*

See particularly the case in 6 *Wend.* opinion of the court at pages 619, 620.

In New Hampshire, the maker of a note cannot set up usury in an action by a *bona fide* holder, the statute of 1791 not declaring the contract void, but prohibiting usurious interest.—2 *N. Hamp. Rep.* 410.

his is so analogous to our statute as to point infallibly to its proper construc-

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tion on this point. It may be asked, whence the decisions in Massachusetts, South Carolina and New York, against innocent holders?

My reply is, that when those decisions were made, in each of those States, the statute rendered the contract void. Now, the law of Massachusetts and South Carolina does not render the contract void. The South Carolina act is a transcript of ours. And in New York, by the revised statutes, usury is no defence on a bill or note in the hands of a *bona fide* holder for valuable consideration.

Now, if the court please, will it contemplate the course of decisions in the foregoing States, on the very question at bar, since the above change in their statutes?

They have overruled all their earlier decisions, and the witness is admitted in each of them. I do not say that they have expressly put the change on this ground; but when the innocent party was protected, the reason of the rule having ceased, and the testimony operating only against the guilty, the rule was immediately modified, and it was declared an abuse of the rule to apply it to the protection of the guilty.

But let us pursue this illustration a little further.

By the Act of 1842, Pamphlet 168, where the usurer brings his action, he may be required to state by affidavit, and be examined as a witness, to the truth of the plea of usury; and if he refuses, the defendant may do the same.

If Winkler, the guilty party, and plaintiff in this action, had sued Thompson, he could have been made to testify, and if he refused, Thompson could have been a witness in his own case.

Yet you will so harshly apply a law, rejected in England, never adopted by the Legislature of Georgia, repudiated by all the judges in 1832, rejected now by three-fourths of the States, and expressly limited in favor of innocent parties by the Supreme Court, by the limitations they put upon it—I say you will apply this law so harshly as to deny to an innocent endorser, defendant in an action, the benefit of testimony which, under the Statute, the maker could give, or force to be given, in his own case.

Massachusetts has adopted recently a similar Statute with our own on this subject. Everywhere, in England, in these States, by local legislation and State judicial decisions, the tendency of the law is onward in its progress to the detection of fraud in this particular.

Will this court throw itself back upon Walton and Shelly, and by an unqualified application of its rule obstruct this progressive movement in Georgia?

How different is the position of this court from that occupied by Lord Mansfield in the time of Walton and Shelly. Then England had just emerged, in her industrial pursuits, from the tillage of the ground to the commerce of the world; her path was on ocean deep—she stretched her arms, Briareus like, to grasp within her embrace the four quarters of the globe.

Her great Chief Justice felt the change, and he sought to engraft upon the common law those principles of the civil law adapted to her new position. He was happy in much that he did—he erred in some. The cooler judgment of his successors pruned the exuberances of his fertile genius, and, among others, speedily lopped off this famous branch, this exception to the established Law of Evidence, and again enabled the Judiciary of the country to repose on its ancient, sure and well-defined rule.

But what is your Honors' position, and why should you innovate? Surely the rule of evidence which satisfies the commercial demands of England may suffice the wants of America; especially when that rule has become hoary and venerable by time and experience.

How different, too, your position from the Supreme Court, U. S. They have attempted to introduce principles of the civil law: it is becoming a favorite

that court. They have no positive inhibitions. But your Honors are bound to the common law, by our adopting Statute, so firmly that you cannot sever the ties without doing violence to the Statute Book on whose page it is written: "The common law of England, as it existed in 1776, shall be the law of this State," &c.

True, there is one exception—a proviso as to its *applicability* to our institutions. But I submit, what is there in the ancient rule of the common law on this subject inapt to the genius and institutions of our country?

Will not Liberty repose as securely enthroned, whether the credibility of a witness be weighed by a jury or his competency be decided by the court? Indeed the former is more of kindred with our institutions than the latter; and by her recent Statute monarchical England has yielded more obeisance to popular sensibility on this subject than republican America. Where did Phillippis and Sewall obtain their information, in 1836, when they published their edition of Bayley on Bills, that this question was still an open one in the Supreme Court, U. S.? They are citizens of Boston, and were neighbors of the late learned Judge Story.

And if your Honors will appreciate his views of the decisions of the Supreme Court, and of this point, turn to his own decision in the Circuit Court, where he admitted a grantor to a deed, if not otherwise interested, to be competent to prove fraud in the deed, and where he says, "*I understand it to be settled in many States, contrary to the doctrine now established in England, that a party to a negotiable note or bill shall not show it originally void.*" This was in 1835. The case in 6 Peters was in January, 1832. Yet the judge says he *understands* it is settled in *many States*—not an allusion to the Supreme Court, nor to the question as being *settled* there, but to that court he was amenable, and to it he would have referred if he had regarded the question as settled there. The judge goes on further to say that the principle has not been applied even to all negotiable instruments.—See 2 Sumner, 235.

If we must have Walton and Shelly, let us not take the imperial edict in its totality, but let it be modified by the lights of experience, by the dictates of reason, by the policy of protecting the innocent. Let it not come to us a cloak and cover and disguise for fraud; let it not, in the name of honesty, become the shield of the guilty, and the executioner of truth and justice.

Our Statute of 1842 comes like a ministering angel to the relief of the necessitous and oppressed; but this heartless rule screens the guilty, and mocks at the distressed.

If Winkler had sued Thompson, the latter could have been his own witness, under the Statute; but with the subtle cunning of fraud he pounces upon the innocent victim, who, knowing nothing of the facts of the usury himself, cannot be his own witness. He calls in vain, under the Statute, upon his pursuer, who refuses to answer; and this miserable rule of law closes the mouth of the only witness on earth who can speak to the truth, although that witness has in the case no interest to disqualify.

My attention is directed by the argument of the opposing counsel to the remark of Mr. Greenleaf, in a note to his valuable treatise on evidence, that each of the decisions against Walton and Shelly was made long before that rule was recognized by the Supreme Court, except the one in New Jersey.

That is not precisely so. The decision in 6 Peters was made in 1832. In the same year, but subsequently, Slack and Mose, in Georgia, was decided.

The case in 12 Pickering was decided in the following year, 1833. And several of the other cases preceded but a short time. If the note of Mr. Greenleaf be thought to indicate the inclination of his mind, he stands alone among the elementary writers; and Phillippis and Sewall, and Cowen and Hill, in the notes to Bayley and to Phillippis on Ev. manifest a much stronger leaning the other way.

With these remarks upon the rule of exclusion, its modification, and the pro-

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priety of its application to the case at bar under our statutes of usury, I submit that question.

I am now met by an argument from my learned opponent, which demands notice rather because of the imposing aspect imparted to it by the mode of its statement, than because of any intrinsic force it possesses.

That argument is, that as the note or bill imports a valuable consideration, there must be *aliunde* proof to show that the note was not transferred for valuable consideration, before the maker could be admitted to state the facts connected with its negotiation.

We offer the witness to prove the circumstances under which the note was negotiated, the only witness in the world who has knowledge of the facts, but the argument asks us to prove those very facts by some other witness or testimony, before we shall introduce this witness; and the reason assigned is, that the witness is incompetent, and cannot restore his own competency.

But is it not perceived that this is the very question in controversy, to wit, the competency of the witness? Is not this a begging of the question? the *petitio principii* of the logician? It is arguing in a circle. My learned opponent was not insensible to the difficulty of the argument, and attempts to relieve himself by seeking refuge under the case of Walton and Shelly.

He assumes that Walton and Shelly is law, that it is applicable to the particular case at bar, and applicable to it under the Georgia Statutes of Usury. All this must be conceded, or his argument is worth nothing. But all this is disputed between us—this involves the whole controversy. In pursuing his argument, the intelligence and candor of the counsel forced him to the admission, that the whole argument rested upon the fact that the rule in Walton and Shelly prevailed; and the cases he cites from Pennsylvania furnish the argument, because in that State the rule in Walton and Shelly is recognized.

My whole preceding argument, therefore, has been an answer to this reasoning of my adversary. Reject the rule in W. and S., modify and shake it, demonstrate its inapplicability to the case at bar—and what becomes of the counsel's argument?

The superstructure must fall when the foundation is removed. This argument, then, however specious, is fallacious; and only remits us back to the very inquiries we have been all along pursuing.

The general principle, therefore, cited from the elementary works, upon the means of restoring competency, are wholly inapplicable to the present question.

If, then, we have relieved ourselves from the operation of the rule in Walton and Shelly upon any of the arguments advanced, or grounds assumed, the remaining question is, whether the witness be competent on the ground of interest, under the ancient rule of the common law?

And upon this subject, we remark, that the true test of disqualifying interest is, whether the witness will gain or lose by the direct legal operation and effect of the judgment; or, whether the record will be legal evidence for or against him in some other action.

It cannot be, and is not pretended, that the record in this case can be used either for or against the witness in any other suit.

If the interest of the witness is balanced, he is competent.

Without going through the numerous cases and examples illustrative of this proposition, let us look at once to the cases of parties to bills and notes, and in general their interest will be found equally balanced, and the witness admissible.—*Greenleaf*, 445.

And let us further take, as among parties to notes, the precise case at bar, of an action by endorsee vs. endorser, and maker offered as witness. In such case

he is considered a good witness, as the books tell us, because, if the plaintiff prevail, the witness will be liable to pay the note to the defendant, and if the defendant prevail, the witness will be liable to the same extent to the plaintiff.—See *Greenleaf*, 446; 1 *Phil. Ev.*, 67; *Note by Cowen*, 117, 118, page 130, 131, 132; *Bayley on Bills*, 593; 16 *John. Rep.*, 70; 3 *Wend.*, 415; 10 *Wend.*, 93; 15 *John. Rep.*, 270; 3 *Martin*, 657; 4 *ib.*, 539, 540; 2 vol. of *Cowen's Notes to Phil.*, marked 3 vol. of the set, *Note*; 118 page of the *Supplement*, 1545, 1548, where all the cases are collected; *Chitty on Bills*, 7 ed. 413; 3 *Conn. Rep.*, 101; 6 *Har. & John.*, 172, 173.

To this general rule, undoubted in the English courts, stated by all the elementary writers, and supported by a series of American cases, there is only one opposing case in Massachusetts that I have fallen upon, and one exception to the rule. The opposing case has been virtually overruled in Massachusetts, not upon the precise question, but because the later decisions have greatly relaxed the rule, as to competency of parties to notes, even where the action is by the holder vs. maker or acceptor, by allowing the drawer or any endorser to be a competent witness; thus going beyond the decisions in New York and other States.—See 11 *Pick.*, 417; 6 *Greenleaf*, 390, 394; 14 *Pick.*, 44, 47, 48.

The exception to the rule is, that where the note was endorsed for the accommodation of the maker, the latter cannot testify between endorsee and endorser. This exception is maintained in some of the cases—and the reason assigned for it is, because the maker would be liable to the endorser in case of judgment against him for the costs in that suit.

Our case would fall within that exception, if it were not relieved, as it is relieved, by two decisive considerations.

1. The first is, that a release for the costs was filed in the cases in the court below, and marked by the clerk of that court as filed, of a date anterior to the verdict and appeal. They have remained since with the papers, and constitute a part of the documents in the cause in court. Of this fact the witness had been notified.

If the particular attention of the court was not called to these releases when the witness was offered and rejected, it was because the court put the rejection on the rule in *Walton and Shelly*, to which the release could not have been beneficially applied.

2. But the second and unanswerable answer is, that as by our statute the usurious contract is not void even against the usurer, the plaintiff must have recovered the principal of the debt, and the same costs would have followed, whether the usury was proved or not.

So that as the witness's testimony could in no wise have affected his liability for costs, or increased or diminished the amount of that liability, it inevitably results that the witness had no interest in the question of costs.

Summary of the Foregoing Argument.

1. That the rule in *Walton and Shelly* is an exception to the rule of evidence of the common law.
2. That in England, where it was introduced, it was speedily abandoned.
3. That the weight of authority in the courts of the States of America, is overwhelmingly against the rule.
4. That where it has been, and is still recognized, in the State courts, it has been so qualified as to apply only to negotiable paper, and in behalf of *bona fide* holders without notice.
5. That the decisions in the Supreme Court U. S., are very superficial on this point, and obviously not well considered, with reference to the learning on the subject with which the State court adjudications abound.

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6. That the Supreme Court, by limiting the rule to negotiable paper have rejected the civil law maxim of *nemo suam*, &c., and placed the rule upon the more sensible basis of the policy of the law to protect innocent holders in course of trade.

7. That upon every principle of accurate reasoning, this consequence follows; the limitation of the rule to negotiable paper.

8. That however the Supreme Court may feel at liberty to trench upon the common law, the courts of Georgia are bound by our adopting statute, which also declares that the common law as adopted shall not be changed but by the Legislature.

9. That under our statutes of usury, the innocent holder cannot be affected, although the usury be proved, because the statute makes the contract valid, and punishes the usurer by abating the interest.

10. That by our statute of 1842, the maker as against the usurer, might be a witness in his own case—and that the adoption, construction and application of a rule of law, which would place an innocent endorser in a worse situation, would be alike perverse of all rules of interpretation, and of the legislative mind.

11. That the argument of opposing counsel, which requires *aliunde proof* of the facts of the negotiation, before witness can be heard, is wholly fallacious. That it begs the question and assumes the whole controversy.

12. That the interest of parties to bills and notes is generally balanced; that whatever diversity exists as to the testimony of the endorser, the rule is well settled that the maker is a good witness in an action between the endorsee and endorser.

13. That the question of costs cannot arise in this case.

It is objected that the note given in evidence varies from the special plea. But it is submitted that there is no variance between the evidence and the first special plea. And it is further maintained, that that plea is sufficient to meet the requisitions of our statute.

In England, the defence of usury may be given in evidence under the general issue, in assumpsit or debt on simple contract.—1 *Str.* 498; 1 *Saund.* 295, *b. n.* When it is specially pleaded, the usurious contract must be set forth particularly, according to the facts.—3 *Chitt. plead.*, 909; 2 *M. & S.*, 377; 3 *Tm. Rep.*, 538.

But if this is not done, and it is plead generally, it can only be taken advantage of upon demurrer.—2 *M. & S.*, 377; 1 *Campb.*, 166. And for the reason, that if the plaintiff pleads over, the court can only try the issue made.

We maintain, however, that the first special plea does sufficiently set forth the usurious contract; and is a compliance not only with the requisitions of our statute as to pleading, but with the stricter rules of English pleading on this subject.

It is objected, that the interest paid by the maker may be recovered back in an action by him or his assignee.

And this is true, if it were not already allowed him by the verdict in this case. If he has had the benefit of this payment, then he is not entitled to recover it a second time. Scudder as the endorser of Thompson, is only liable upon Thompson's failure to pay. But if Thompson has paid on this note an amount of money, Scudder is entitled to have the benefit of the credit; and as the law allows no interest, it is rightly and properly a credit upon the principal of the note.

All which is very respectfully submitted.

ROBERT M. CHARLTON in reply.

1. We say, that Joseph R. Thompson was an incompetent witness to pr-

fact that the note offered in evidence was tainted with usury when he passed it to the plaintiff—because,

1st. A party to a negotiable note cannot be admitted to invalidate it, or to show that it was infected when it passed out of his hands.—*Walton vs. Shelly*, 1 Term. Rep., 296; *Chandler vs. Morton*, 5 Greenleaf's Rep., 374; *Coleman vs. Wise*, 2 John. Rep., 165; *Winton vs. Saidler*, 3 John. Cas., 185; *Mann vs. Swan*, 14 John. Rep., 270; *Manning vs. Wheatland*, 10 Mass. Rep., 506; *Bank of U. S. vs. Dunn*, 6 Peters' Rep., 56; *Bank of Metropolis vs. Jones*, 8 Peters' Rep., 12; *Henderson vs. Anderson*, 3 Howard's Rep., 73; *Griffith vs. Redford*, 1 Rawle, 197; *Emerick vs. Harley*, 2 Wharton's Rep., 51; *Davenport vs. Freeman*, 3 Watts and Sergeant, 557; *Gest vs. Espy*, 2 Wait's Rep., 267; 1 Greenleaf's Evidence, sec. 382 to 385, and notes.

The principle stated in the case of *Walton vs. Shelly*, is not a new principle, established by Lord Mansfield then for the first time. The counsel opposed in that case admitted that it was a well established principle, and the court expressly put it on that ground. Our Statute of 1784, therefore, incorporated the principle. It is the case of *Jordaine vs. Lashbrooke* that is liable to the bar of that statute.

2d. We say, that the principle upon which the case of *Walton vs. Shelly* proceeded, was, that "*nemo allegans suam turpitudinem, audiendus est.*" No one, therefore, can be permitted to show by his testimony, that the negotiable paper he has parted with was tainted or infected by usury, or other illegal consideration, at the time he parted with it.—*Walton vs. Shelly*, 1 Term. Rep., 296; 8 Peters' Rep., 12.

Now this being the foundation of the rule, it will be evident that the distinction which some of the cases seek to draw, that the rule is only applicable when the note is in the hands of an innocent endorsee, is not a sound one; that might have been an additional inducement; but the true rule that excludes the witness is, that he shall not be heard to defeat or deny his own act. An analogous principle is recognized in the common law, which estops a party from denying a statement made in a deed, or in other solemn manner; and the rule in *Walton vs. Shelly* incorporates the essence of this rule of estoppel, and applies it to a witness who, though not a party to the suit, was a party to the transaction which his testimony is sought to impeach. The rule of the common law as to estoppel is even more stringent than the rule in *Walton and Shelly*, because it prohibits a party to a deed or other act, from proving anything to the contrary by any witnesses. The rule in *Walton vs. Shelly* only prohibits such proof coming from the oath of the person who actually committed the act. The principle excludes the witness, and so do the well-established cases, even where the party suing is alleged not to be an innocent endorsee.

In the case of the *Bank U. S. vs. Dunn*, 6 Peters' Rep., the holder, (according to the testimony of *O. Carr*, the witness,) not only knew of the fraud, but originated it; and yet, in that case, the testimony was excluded.—6 Peters, 56.

So, in the case of *Coleman vs. Wise*, 2 John. Rep. 165, the real plaintiff had knowledge of the usury, and the distinct point was determined in *Mann vs. Swan*, John. Rep. 270.

And see *Henderson vs. Anderson*, 3 Howard's Rep. See particularly pp. 75, 77, 78.

You cannot limit the rule to innocent endorsees, without changing the very principle upon which the rule is expressly based.

Nor can it make any difference, that the witness was the person for whose accommodation the note was made. That strengthens and confirms the principle, because when he transferred it, the note for the first time had a legal existence.—*Hartford Bank vs. Barry*, 17 Mass. Rep. 94,

the very case in 12 Pickering, 565, (*Van Schaack vs. Stafford*), which will be relied on by our adversary, admits that it was not really a note, until it

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was discounted. With the act of Thompson, therefore, in passing it to Winkler, this note began its legal existence.

3d. But suppose we admit the qualification of the rule, and concede that it is applicable only when it would affect the *innocent endorsee*; still, it was improper to admit the testimony of Joseph R. Thompson at the time that it was admitted, and to testify to that fact.

Your Honors will remember, that when the witness was admitted to testify, there was not the slightest evidence that the plaintiff was not an innocent endorsee. The only evidence then before the court below, was a negotiable promissory note free from any suspicion on its face. Such a note is *prima facie* evidence of value and legal consideration, and imports it until the contrary is shown.—*Bayley on Bills*, 2d Amer. ed. p. 492; *Chitty, Senr. on Bills*, 8, Amer. ed. p. 79.

The general principle of evidence is this: That when a witness has testified to facts, which render him incompetent, or, in other words, where his incompetency has been made out alone by his own testimony, he may by his own testimony restore his competency: but where his incompetency appears *aliunde*, the witness cannot be admitted, either on the *voir dire*, or in *chief*, to remove it.—*Greenleaf's Evidence*, Sec. 423; 2 *Cowen Phillips on Evidence*, p. 260, Note 256; *Roscoe on Civil Evidence*, p. 80.

Or, to state the rule in the language of the court, in *Griffith vs. Redford*, (1 *Rawle's Rep.* 197,) "A witness cannot make way for his testimony in *chief*, by taking his case out of a rule which, *prima facie*, furnishes a valid objection to it."

Now, suppose we take the modification of the rule, as claimed by our adversary, that the principle, in *Walton vs. Shelly*, can only be applied where the transfer has been made to a *bona fide* holder for valuable consideration, still, as this paper, upon its face, and upon the presumption of law, (which always imports a valuable and *bona fide* consideration to a note, until the contrary is shown,) has been so transferred for a valuable consideration, and as Joseph R. Thompson, so long as that state of facts remained uncontradicted, was inadmissible, he was not admissible to disprove that state of facts, so as to make way for his testimony in *chief*.

It would be inconsistent with sound reason to say, that unless a state of facts proved *aliunde*, he disproved, a man shall not be a witness, and yet admit him to prove the very facts that will render him competent. The state of facts rendering him incompetent, having been proved *aliunde*, the facts that will restore his competency must also be proved *aliunde*.—*Mann vs. Swan*, 14; *John. Rep.* 270; *Griffith vs. Redford*, 1 *Rawle*, 197.

The note in this case, therefore, being *prima facie* evidence of good consideration, and of being in the hands of an *innocent endorsee*—and the principle of *Walton vs. Shelly* excluding the witness, (even with the modification of the rule,) whilst such note was in the hands of an *innocent endorsee*—Thompson was incompetent to testify at the time he was admitted, and for the purposes for which he was admitted.

But now, supposing that Thompson was admitted properly, and waiving, for the sake of argument, the rule that we think excluded him, did his testimony prove the facts stated in the plea? It is perfectly clear that it did not.

The second plea (under which the court below admitted the testimony to the jury) states that the consideration of this note was the usurious interest on the loan alleged therein, "the principal having been paid by the said Joseph R. to the plaintiff."

The principle of law is, that a plea of usury must *precisely* set forth the usurious contract.—1 *Saunders's Rep.* 295, a. note; *Smith vs. Brush*, 8 *John. Rep.* 66; *Tate vs. Wellings*, 3 *Term Rep.* 538.

I am perfectly aware that these cases were in *debt*, and that until the recent rule of *Hilary Term* 4, *William* 4, a distinction was taken between *debt* and as-

sumpsit, and that, in the latter action, the usury might be given in evidence under the general issue.

But that proceeded upon the unscientific and barbarous principle, (if it can be called one,) that in *assumpsit*, whatever disproved an existing debt, at the time of action brought, might be given in evidence under the general issue.—See *Gould's Pleading*, Chap. vi. Sec. 44 to 51.

This principle, however, has not prevailed in Georgia since the year 1799.—*Prin. Dig.* p. 421, Sec. 9; *Longstreet vs. Reeside & Fuller, Decisions Superior Courts of Georgia*, 1st Part, p. 39, 42.

And the good sense of the English Judges has abolished it.—See 1 *Chitty's Pleadings*, (9th American edition,) 515 (a) 517 note (h).

The principle which allowed usury to be given in evidence under the general issue in *assumpsit* having been abolished, *usury* must be *pleaded*, and cannot be given in evidence under the *general issue*; and thus, the distinction being broken down between *debt* and *assumpsit* in this regard, the rule that requires all the particulars of the usurious contract to be *precisely* set forth, is as applicable to such plea in *assumpsit*, as well as in *debt*.

The usurious contract must not only be correctly set forth, but it must be fully, and fairly, and distinctly set forth.—*Hill vs. Montague*, 2 *Maule and Selwyn*, 377.

(In Georgia we have no demurrer at common law—the objection must be taken by objecting to the evidence offered under it.)

And this is in obedience to the rule of pleading that “in general, what is alleged in pleading must be alleged with certainty.”—*Stephens on Pleading*, 3d *Amer. Edit.*, p. 333, also page 337 top page.

And in *Georgia*, the statute of 1799 requires this fullness.—*Prince* 421; *Sec.*, 9.

And it is more especially necessary that it should be full and correct here, where no special pleading is allowed—where the parties are compelled to go to trial upon petition and plea, and the real point cannot be brought down by replication and rejoinder, &c.

Now this plea is a mere general one of usury, without stating the time when, the amount loaned, or the manner in which it was loaned. It is liable, and with more force, to the objection taken in *Hill vs. Montague*.

And it is liable to the further objection, that it does not correctly set forth the consideration for the note sued on, but declares, “that the consideration of this note is the usurious interest on the said loan, the principal having been paid by the said Joseph R. Thompson, to the plaintiff”—a fact wholly disproved by the testimony of said Joseph R. Thompson, the payments having been made on account of the *interest* exclusively, and the note in suit being expressly given for the *principal* alone. Even admitting that the payments made for interest were, by legal operation, to be applied to the principal, (a point which we will hereafter controvert,) still the plea is not true; for a large part of the principal confessedly remains due, and is so found by the jury.

For these reasons of variance between the *allegata* and *probata*, the testimony should have been excluded from the jury.

3. Another ground of objection remains. The witness proved that when plaintiff first loaned the money to him upon discount of the original note, he paid witness the amount, less the usurious interest. In all the subsequent renewals, witness paid the usurious interest in cash.

1. These were voluntary payments, and as such they could not be recovered back.—*Archbold's Nisi Prius*, 49; *Law Library*, 197, also 203.

There is no forfeiture for taking more than 8 per cent. The law does not make the contract void, it says it shall not be void, but it will not allow you to recover, by *legal process*, any more. It gives you no remedy to recover more. But if you can get it without legal process, if it be paid voluntarily, it cannot be recovered

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back from you.—*Prin. Dig.* 295. And however this may be as to the illegal excess, yet all the authorities say that the legal interest, voluntarily paid, cannot be recovered back. Indeed, the excess cannot be recovered without offering to pay the principal and legal interest.

2. If they could be recovered back, it could only be by Thompson, or his general assignee in bankruptcy, and not by the defendant Scudder, who had never paid them. The plaintiff could not be exposed to the danger of being sued by two persons in separate actions for the same cause of action.

Besides, there was no privity of contract as to the money paid between plaintiff and defendant; and if there were, this is not an action brought to recover back the money paid.

3. There was not the slightest testimony that any payment was ever made on account of the *principal*. All the payments were expressly made on account of the *interest*. The court below erred, therefore, in refusing to charge, as plaintiff's counsel requested, and in leaving it to the jury to say how much of the principal had been paid. The court has no right to submit a hypothetical question to a jury, when there has not been the slightest evidence to the point.—10 *Wendell*, 461; 4 *Wendell*, 639; *Graham on New Trials*, p. 261 *et seq.*

We submit, therefore, in conclusion:—

1st. That a party to a negotiable note cannot be permitted to show that there was any invalidity when it passed out of his hands, and that, therefore, Joseph R. Thompson, the witness, was improperly admitted.

2d. That if the rule above claimed be limited to cases where the note sued on is in the hands of an innocent endorsee, that the *aliunde* proof when Thompson was admitted raised the legal presumption that plaintiff was an innocent endorsee, and until that *aliunde* proof was disproved, Thompson could not, upon legal principles, be a witness, and he could not be admitted a witness to disprove this *aliunde* proof, and therefore that he was improperly admitted to testify.

3d. That if Thompson was a competent witness, yet that the facts stated by him did not coincide with the statements of the pleas of the usury; and that as the *allegata* and *probata* did not agree, the said testimony should not have been permitted to go to the jury.

4th. That there was no evidence that any part of the *principal* of said note had been paid, and therefore under any circumstances, the plaintiff was entitled to a verdict therefor—and that the court below erred in refusing so to instruct the jury, and in leaving the question to them.

By the Court—NISBET Judge.

Suit was brought in Chatham Superior Court, by Z. M. Winkler, the plaintiff in error, against Amos Scudder, an endorser upon a promissory note. The plea of usury was filed, and Joseph R. Thompson, the maker, was called to prove it, and his testimony admitted. The first assignment of error is "That a party to a negotiable note cannot be permitted to show that there was any invalidity in it when it passed out of his hands, and that, therefore, Thompson was improperly admitted."

In England this question was settled before the statute of Victoria. Long before that act the rule as laid down by Lord Mansfield in *Walton and Shelly* was repudiated, and the rule as settled in *Jordaine and Lashbrooke*, by Lord Kenyon; acquiesced in by the people, the profession and the courts. The history of this question in England is this: Lord Mansfield in *Walton and Shelly* in 1786, determined that a party to a negotiable security or instrument, could not be a witness to impeach its validity. This decision applied to *all* instruments without qualific-

or exception, and embraced all written contracts, deeds and wills, as well as negotiable securities. A few years afterwards in Bent and Baker, the rule received its first modification and was in that case limited by Lord Kenyon to negotiable paper. In 1798 in the case of Jordaine and Lashbrooke, the cases of Walton and Shelly and Bent and Baker, were overruled, and the rule established by them exploded. Since that time there has been in England no controversy about the matter. Both at common law and by statute, a party whose name appears to any instrument, is held competent to impeach its validity. So much for the authority of the rule as recognized in England. Let us now look into the sufficiency of the reasons upon which it is founded. All great questions ought to be settled in consonance with reason as well as authority. Authority is controlling only so far as it is sustained by principle. No questions concern the rights of the people more directly and intimately, in the administration of justice, than questions of evidence. In the language of Lord Kenyon, "on the rules of evidence depend those facts which are introduced in every case and therefore it is of the utmost importance to preserve those rules." Evidence is for the ascertainment of facts, and facts enforce or inhibit justice.

In Walton and Shelly Lord Mansfield placed the exclusion of the witness upon two grounds, to wit: public policy, and the maxim of the civil law, "*nemo allegans suam turpitudinem audiendus est.*" "But what strikes me, says this great lawyer, is the rule of law founded upon public policy, which I take to be this: that no party who has signed a paper, or deed, shall ever be permitted to give testimony to invalidate that instrument, which he has so signed, and there is a sound reason for it, because every man who is a party to an instrument gives a credit to it. It is of consequence to mankind that no person should hang out false colors to deceive them by first affixing his signature to a paper, and then afterwards giving "testimony to invalidate it." He illustrates his meaning by referring to a gaming note in the hands of a bona fide purchaser, without notice, and to a note given for a usurious consideration, in the hands of a fair endorsee. "The public policy," which he had in his mind, was the commercial policy of Great Britain, and particularly in reference to negotiable securities. This is manifest from the illustrations which he gives. Lord Mansfield is considered the father of the commercial law. And so magnificent a system is worthy its illustrious parentage. It required just such a mind, original, bold, and elaborately cultivated, to engraft upon the British common law those principles which now constitute the body of the law merchant. The condition of Great Britain in his day required the improvements in this regard, which he made. They were necessary to sustain her rapidly growing trade and various commercial pursuits. She was then throwing off the restraints of Federalism, and multiplying the industrial pursuits of her people. She was then, in fact, a great commercial State. Lord Mansfield felt the impulse of the age and sustained it, by a long series of wise decisions. He had a zeal for the commercial policy of England, which seems to have pushed him occasionally into extremes. And the decision now under review is an illustration of it. The rule was impolitic in the judgment of British courts lawyers, as is proven in its early repudiation. But admitting that policy in England, at that day, made such a rule of evidence ne-

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cessary, we deny that at this day, and in our country, it is necessary. If the rule established in *Jordaine and Lashbrooke* is sufficient for the commercial policy of England, it is of course sufficient for the commercial exigencies of Georgia. Although the mercantile interest here is great, our agricultural interests are paramount. Ours is an agricultural community. Negotiable securities are here under the law regulating bills of exchange and promissory notes, as well as the great interests represented by them, sufficiently protected, without the aid of Lord Mansfield's rule of exclusion. They do not need the encouragement which that rule affords, and, therefore, the reason for it, founded in public policy, does not seem at this day and in this country to apply.

The exclusion of a party to a paper was designed to encourage commerce by discouraging fraud. We concede that it is of consequence to mankind that no person should hang out false colors to deceive them. He who negotiates a note for value, knowing it to be invalid, without disclosing the fact, is guilty of a fraud upon his endorsee and upon mankind, as well as an act of heinous immorality. This cannot be questioned. Yet it may be questioned whether his exclusion has the tendency to discourage such fraudulent acts. Entrenched in legal forms, he is protected from that public censure and indignation to which his own revelation of the facts would inevitably expose him. Such immunity is not likely to discourage fraud. It conceals and disguises fraud, by withholding the only witness who can develop it. The rule too operates injuriously upon parties defendants, who being entitled to certain defences by law, are yet unable to avail themselves of them by the exclusion of the only witness who may be cognizant of the facts upon which they rest. The rule further enables the party plaintiff holding an instrument, to perpetrate a fraud, by getting the only witness knowing of its invalidity, to put his name upon it, and thus silence him forever. The argument founded upon the discouragement of fraud, is equally balanced to say the least of it.

The objection founded on the maxim of the Roman Law, is not as we believe strong enough to exclude the witness—not so strong as to overrule those considerations of right and policy, before urged in favor of his competency. The spirit of the maxim "*nemo allegans, &c.*," seems rather to apply to parties than to witnesses. No one who comes into court alleging his own immorality, and on that account claiming a benefit, ought to be heard. A witness who is brought there, and speaks for the benefit of others, stands upon different grounds. Objections of this sort, founded in the want of character, lie to the credibility rather than to the competency of witnesses. The courts of justice in England led the way for the sweeping statute of Victoria. They were in advance of the Legislature, and were fast verging to the ground finally taken by Parliament. That is, to the admission of witnesses without regard to character; having the weight of their testimony to be judged of by the jury.—*Greenleaf*, 452-3, Note; 2 *Starkie on Evid.*, 9, 10; 2 *Hale P. C.*, 280; 11 *East* 309; 5 *M. & S.* 244. In this country this waiver of all objections upon this ground to competency, would be safe. We might well trust almost any one to testify before the juries of our country. The modern practice is in accordance not only with the spirit of the age, but with the genius of our institutions. The maxim of the civil law, if it applies at all to the case before us, applies with greatly mitigated force. Here the

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borrower of money, in behalf of his own endorser is called to testify, to sustain a plea of usury. Laws against usury are conservative of public morality, and he is called to support them. The immorality of the borrower, who pays or contracts to pay, illegal interest, is nothing like so great as that of the lender who receives it. He is not strictly "*in pari delicto*." Particularly when we consider that our statute against usury is not penal, but inhibitory.

Let us inquire now how this question stands in the United States. Here it is admitted, there has prevailed and in fact still prevails, much conflict of opinion and authority. The rule of Walton and Shelly seems at first to have been adopted in most of the States, and now prevails with modification in the Supreme Court. Several of those States, which first adopted the rule of exclusion, and among them the great commercial States of New York and Massachusetts, have gradually receded from it. And now, we have no hesitation in saying that the authority of the States is against that rule—whether considered in reference to numbers, the standing of the courts, or the learning of the judges. In *Winton vs. Saidler*, New York fully adopted the Walton and Shelly rule.—3 *Johns. Cas.* 185; 14 *Johns. Rep.*, 270. In 18 *Johns. Rep.*, 167, the court takes the ground that "the reason and policy of the rule was to protect *bona fide* holders. In *Tuthill vs. Davis*, 20 *Johns.* 287, the endorser in a suit against the maker, was admitted to prove that the note sued on was given in discharge of others, tainted with usury. And here Walton and Shelly was abandoned.—See also 5 *Cowen*, 23; *Ibid.*, 153; 3 *Wend.*, 415. In Massachusetts the Walton and Shelly rule is confined to *bona fide* holders without notice. In the case of *Fox et al. adms. vs. Whitney*, 16 *Mass.*, 118, the action was brought by the administrator of the payee of a note against the administrator of the maker. The plea of usury was filed and the security on the note called to prove it and admitted. Parker, C. J. said: "The rule by which parties to notes are excluded from being witnesses, to discredit the security to which they have given currency, does not apply to the case before us. Such witnesses are excluded upon the ground of policy, because in fact their testimony goes to contradict their own acts. It applies only to negotiable securities." The Chief Justice proceeds to say, that it is applicable only to innocent holders of negotiable securities. In Massachusetts, therefore, as between the original parties, the rule of admission obtains. It was so adjudged in the case last referred to in a state of facts precisely similar to the state of the facts in the case at bar. It may be remarked here that in very few, if any of the States, does the excluding rule apply in its original extent. Where it obtains at all, and to this extent it does obtain in many of the States, it is confined to negotiable paper in the hands of *bona fide* holders without notice. For the history of this question in Massachusetts, see 4 *Mass. R.* 162; 7 *Ibid.*, 199; 11 *Ibid.*, 375, 498; 16 *Mass.* 118; 3 *Pick.* 184; 10 *Mass.* 560; 12 *Pick.* 565.

The doctrine, as held in *Jordaine and Lashbrooke* is enforced in Virginia, 3 *Randolph*, 316. In Connecticut, 1 *Conn.* 260. In South Carolina, 3 *McCord*, 71. In Tennessee, 2 *Yerger*, 35. In Maryland, 3 *H. and J.* 172. In New Jersey, 2 *Harrison*, 192. In North Carolina, 3 *Murphy*, 151. In Alabama, 1 *Stew.* 199; 9 *Porter*, 226. In Kentucky, 3 *Little*, 221. The rule of Walton and Shelly limited to negotiable securities, in the

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hands of bona fide holders without notice, is held in the Supreme Court of the United States.—6 *Peters*, 51, 57; 8 *Peters*, 12; 11 *Peters*, 86, 94, 95; 12 *Peters*, 149. In Massachusetts as before explained. In New Hampshire, 2 *N. Hamp. R.*, 212. In Maine, 4 *Greenleaf*, 191; 5 *Greenleaf*, 374. In Pennsylvania, 6 *Watts*, 498; 8 *Watts*, 304. In Mississippi, *Walk.*, 541. In Louisiana it is supposed that the rule is unsettled; so in Vermont; so in Illinois; so in Ohio.

The authority of *Walton and Shelly* was considered by the judges of our own State in the case of *Slack vs. Moss*, many years ago, at a time when the circuit benches were occupied by men whose integrity and learning have not been questioned; and at the head of whom was the late eminent Judge Crawford. They rejected the authority of that case, and it is believed that the courts of Georgia have very generally acquiesced in their decision.—*Dudley*, 161.

The authority of the Supreme Court has been invoked in behalf of the plaintiff in error, with great strength of reasoning and eloquence. It is claimed that the Supreme Court is the highest and most authoritative tribunal known to our Union, and that its decisions form an elevated rallying point for the courts of the States. That with a view to uniformity and harmony, it is better for this court to conform to its decisions, than to abide by the authority of other courts, however imposing in their organization, or distinguished by their learning. We promptly and cheerfully admit the commanding character of our great national tribunal—the ability of its judges and the desirableness of harmony between it and the State courts. One answer to these views is to our minds conclusive, and that is—the decisions of the Supreme Court are not the law of this court—the common law as it stood in May, 1776, is. To this branch of the argument we shall again advert. Aside from this fact, the decisions of the Supreme Court upon this subject, come to us as naked adjudications—without reasoning—without any attempt at a collating and balancing of authorities. They seem to be rather in character of *dicta*, than solemn judgments. Their authority is that of the court, and not of argument or learning.

The court, seems, in no instance, to have been desirous of settling this vexed question by authority or reason; but to have been content with the annunciation of its own opinion, the meagerness of these decisions, must strike the most careless reader. This is the more remarkable, since at the time of giving them, a contrary doctrine prevailed in England, and in many of the American States. We pretend not to account for the fact. We only know that such is the fact.

Now the authority of the Supreme Court is, in this court, the moral power of reason and the weight of legal learning. Upon this question it is not commended to us by either, and must yield to other considerations, which we esteem as conclusive upon us. Besides we do not know how long that court will hold to its present opinions—it may recede from them, as it has receded from the doctrine first ruled in the case of the *Bank of the United States vs. Dunn*, in 6 *Pet.* 51. The court adopt there the doctrine of *Walton and Shelly*, in these brief words, "But it is a well-settled principle, that no man who is a party to a negotiable note, shall be permitted, by his own testimony, to invalidate it. Having given it the sanction of his name, and thereby added to the value of the instrument b-

giving it currency, he shall not be permitted to testify that the note was given for a gambling consideration, or under other circumstances which would destroy its validity. This doctrine is clearly laid down in *Walton vs. Shelly*, reported in 1 *T. Rep.* 296, and is still held to be law, although in 7 *T. Rep.* 56, it is decided, that in any action for usury, the borrower of the money is a competent witness to prove the whole case." Now it is very remarkable that the court should declare that it is a *well-settled principle, &c.*, when, so far from the principle being settled in England, it had been overruled by Lord Kenyon in *Jordaine* and *Lashbrooke*, and was not, at the time, the law of the British courts; nor was the principle a settled one, by any means, in the United States.

The court, in 11 *Peters*, 94-5, more explicitly limit the rule to negotiable instruments, and put it upon the ground "of the *currency given to them by the name of the witness called to impeach their validity.*" The authority, therefore, of the Supreme Court does not extend to the exclusion of the witness in a case like that we are now determining, between the original parties. For here the lender is suing the endorser upon a note which he had discounted, and which had never been in circulation.

By what is called our adopting statute, passed in February, 1784, the common law of England and such of the statute laws as were usually of force in the province of Georgia, on the 14th day of May, 1776, are declared to be in full force, virtue, and effect, and binding on the inhabitants of the State, so far as they are not contrary to the Constitution, laws and form of government of the State.—*Hotchkiss*, 93. This statute makes the common law of England obligatory upon this court. The obligations of office, and the oath of office, require us to enforce it as it stood in 1776. If, before that period, the rule of evidence was that all sane persons were competent to testify, unless excluded by interest, or conviction of an infamous offence; if interest and infamy were the only exceptions to the general rule known in 1776; we do not perceive that we have any discretion in the matter. We are bound absolutely to administer the common law as it was then usually of force.

The case of *Walton and Shelly* was some ten years after the 14th of May, 1776. It is contended however, that the rule of *Walton and Shelly* was the law before its enforcement in that case by Lord Mansfield. We think not; but believe that it created an additional exception to the general rule. In *Jordaine and Lashbrooke*, Lord Kenyon says: "I have always understood the rule to be, that where a witness is infamous and his record of conviction is produced, or where he is interested in the event of the cause, he cannot be received; but to carry the rule beyond that, would be extending it further than policy, morality, or the interest of the public require." His attention was particularly called to the rule of *Walton and Shelly*, in consequence of his having been reported in *Bent and Baker*, as sustaining it. That report he disclaims, and says *expressly* that he has not been enabled to find any case before that of *Walton and Shelly*, excluding the witness, and that "he cannot bring his mind to accede to the authority of that case." Now, here is the authority of Lord Kenyon, as to what was the common law, before the case of *Walton and Shelly*. It was said in the argument that the case of *Jordaine and Lashbrooke* was determined upon principles growing out of the revenue laws

Great Britain. The case of *Jordaine and Lashbrooke* was founded on a

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bill of exchange, on its face purporting to be drawn at Hamburg. By statute, all bills drawn within the realm, of certain amounts, were liable to certain stamp duties, and bills drawn upon other than stamp paper were declared void. The witness was called to prove that the bill purporting to be drawn at Hamburg, was in fact drawn in England, and void by statute for want of a stamp. The bill as offered in evidence was a fraud upon the revenue laws of England, and it is true, that several of the justices laid great stress upon this fact, but Kenyon, the master mind of that court, scarcely adverted at all to that view of the subject. He rested upon the common law rules of evidence, and his associates, except one, sustained him upon those rules. Groce, Justice in this case, declares, "Before the case of Walton and Shelly, I never read of this ground of incompetency." It is very clear that the question in *Jordaine and Lashbrooke*, received a most able and careful review; and we must believe that if anything is settled by that case, it is, that Walton and Shelly is an innovation upon the common law, as it stood at the time. To this conclusion the judges came in *Slack and Moss*. We are therefore of opinion, upon any view of the question, that the witness in the court below was properly admitted.

The second assignment of error assumes that from the face of the note, the plaintiff being an endorser, is an innocent holder; and limiting the rule in *Walton and Shelly* to negotiable securities, in the hands of an innocent holder, Thompson, the maker, ought not to have been admitted until by other testimony it was made to appear that plaintiff is not an innocent holder. If the witness is competent at all, he is as much competent to prove the circumstances under which the note was negotiated, and how the plaintiff became connected with it, as he is to prove the usurious consideration. For this purpose he is called. If the rule of *Walton and Shelly*, as modified in *New York*, governs this case, then indeed, upon the hypothesis that the plaintiff is an innocent holder, the witness would be excluded. But how shall it appear that the plaintiff is an innocent endorsee, a bona fide holder without notice. It does not necessarily appear from the face of the paper. The witness is called to testify as to this fact, and the question recurs, is he competent. It is a question of competency still. The view taken in the assignment supposes the defendant able to prove by others what he calls the maker to prove, and if so why call him at all. This is begging the question. If indeed it should be conceded that a party to a note cannot be permitted to impeach its validity in the hands of an innocent holder, still no injury could in practice result from the examination of the witness as to the circumstances under which the plaintiff came into possession of the note, for if it should appear from that examination that he was an innocent holder, the whole of the testimony could be withdrawn from the jury. That in every case the question is one in the very outset of competency, is demonstrated from the character of those reasons which Lord Mansfield gave for excluding the witness. These reasons are drawn from the fact that his name appears on the instrument. They show the impolicy and immorality of a party whose name so appears testifying at all. Lord Mansfield was called to pass upon the competency of the witness from the face of the instrument, and so are we. With great respect for the learned

counsel for plaintiff in error, we are compelled to believe that this second assignment is but a different form of exhibiting the first.

The third assignment asserts "that, admitting the competency of Thompson, yet the facts stated by him did not coincide with the statements of the plea of usury, and that as the *allegata* and *probata* did not agree, his testimony should not have been permitted to go to the jury. To understand the force of this exception, and the answer we shall make to it, it becomes necessary to state, that the plea of usury filed by the defendant was confessedly too vague and general, and particularly defective in two particulars: *First*, the original amount of the loan was not stated, and *second*, the time at which the money was borrowed was not stated. There was no demurrer to the plea on these accounts, no demurrer on any account, the defendant replying to the plea and joining issue upon it before the jury. The testimony was, among other things, that the note sued on was given for the interest reserved. It was argued that the testimony ought to have been withheld because the plea did not comply with our act of '99, in plainly, fully and distinctly setting forth the defendant's cause of defence, and if it did there was a variance between the plea and the proof. We think the plea did not fully comply with the requirements of the statute.

This court in the case of *Johnson et al. vs. Balingall*, ante p. 68, determined in May last, at Milledgeville, that our statute requires so plain, full, and distinct a statement of the grounds of defence, as to put the plaintiff accurately into possession of all the grounds relied upon. We think that our statute was intended to do two things. First it abolishes the technical pleading of the English practice; and second, it inhibits the proof of any special defence under the general issue. Whilst it does not require either the form or particularity of the British courts, yet it does require a clear, full and true statement in reciting the grounds of defence. It is impossible to lay down a general rule, by which the sufficiency of the plea can, in every case, be determined. Each plea must be determined according to its character and the circumstances of the case. All material facts ought to be set forth in all: particularly in pleas of usury. The amount of the original loan and the time when it was negotiated, are material facts. Material because, without these it would be impossible to ascertain the amount of usurious interest received or paid. We are therefore very clear that the plea in this case was not full enough. It was the right of the plaintiff to demur to the plea for a want of fullness and distinctness; and having failed to do so, having joined issue upon it before the jury, he is too late in his exceptions. Had he demurred, either the plea would have been stricken out altogether, or the defendant would have been driven to amend. But it was insisted in the argument that, under our practice, established under the Act of 1799, there is no such thing as demurrers at law. We think differently. We do not demur, it is true, formally, and in writing, nor is the judgment upon the demurrer formally pronounced, and entered, as in England; we demur orally, and the effect of the demurrer, if sustained, is that the plaintiff's writ or defendant's plea be dismissed, unless in cases where either is amendable.

Nor do we think that the common law rule of variance, as applicable plaintiff's allegations and proof, applies here to defensive pleadings. The plaintiff is protected in his right to have a sufficient plea in

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his privilege of demurrer. If he consents to go to the jury on the plea, the jury must determine as to the applicability of the evidence to the plea. We cannot, therefore, sustain this exception.

The last exception is in these words, "That there was no evidence that any part of the principal of said note had been paid, and therefore, under any circumstances, the plaintiff was entitled to a verdict therefor; and that the court below erred in refusing so to instruct the jury, and in leaving the question to them." Upon the trial, the record shows, that the amount of the loan was proven, and also the amount of interest which had accumulated, both lawful and usurious. The jury in their verdict credited the plaintiff's demand with the interest, and found the balance for him. The ground assumed in this exception, if we correctly understand it, depends upon a construction of our statute of 1822. We do not know that the jury believed, from the evidence, that no part of the principal was paid; but suppose they did; then the argument is as follows:—viz. The payments made upon this contract were in extinguishment of the interest: the Act of 1822 does not make the contract void, but only inhibits the collection of anything but the principal; it only denies to the plaintiff a process to collect the interest. The interest in this case being voluntarily paid, the defendant could not maintain his action against the plaintiff for money had and received, and therefore is not entitled to have a credit for the interest when the action is against him on the contract. We confess that this construction of the Act of '22 is exceedingly plausible, and it was not without difficulty that we arrived at the conclusion to give to it a different construction. We think, however, that a just construction of the Act, making all usurious contracts, established to be such in a court of law, void as to the lawful interest and the usurious interest. When a party comes into a court of justice to enforce a usurious contract, the Act visits upon him a forfeiture of the interest, which upon other contracts it allows him to recover: in other words his principal bears no interest. And as we must infer that the jury in this case, believed that the sum which remained due was made up of principal and interest, they did right in abating the lawful interest. As to the excess, thinking as we do that the contract was void as to that, the plaintiff has recovered it contrary to law and good conscience, and an action would lie for the defendant to recover it back; and if so, he can recover it in this action, in the form of a credit, found by the verdict of the jury, upon the plaintiff's demand sought to be enforced against him. So the judgment of the court below must be affirmed upon all the exceptions taken.

No. 20.—ALFRED C. BOSTWICK, Administrator of JAMES BRIGHT, deceased, plaintiff in error, vs. PERKINS, HOPKINS and WHITE, defendants in error.

Equity cannot relieve an administrator after two judgments *de bonis testatoris* and *de bonis propriis* have been successively recovered against him *at law*.

This was a Bill in Equity, filed at the instance of the plaintiff in error against the defendants in error, in the Superior Court of the County of Pulaski, to which a general demurrer, alleging an entire want of equity in the bill, was interposed in behalf of the defendants in error; which came on to be heard, before Judge SCARBOROUGH, in said Superior Court, at April Term, 1846. After argument had thereon, the court below sustained the demurrer, and dismissed the bill.

The facts of the case, as alleged by the plaintiff in error, in said bill, and the errors assigned in the decision of the court below, being fully set forth in the opinion of the court, delivered by his Honor, Judge LUMPKIN, is deemed unnecessary to state them here.

ROCKWELL and KENAN, and C. B. COLE, for plaintiff in error.

IVERSON L. HARRIS and ELI WARREN, for defendants in error.

HARRIS, for defendants in error, contended:—

1st. The bill shows no such accident as is relievable in Equity. The eloignment of the negroes from Georgia—from the custody of the persons to whom they had been hired—might have been guarded against by contract. The loss, if loss it be, is the result of the negligence of the administrator.—1 *Story Eq.* 94, 118; *Marine Ins. Co. vs. Hodgson*, 7 *Cranch*, 336; *Penny vs. Martin*, 4 *Johns. Ch.* 569.

2d. No mistake of fact is shown. The confession of judgment by his attorney at law, was a mistake of law: *ignorantia legis excusat neminem* is a maxim of almost universal application. Again; ignorance is not mistake, says Lord Loughborough.

3d. No fraud or imposition imputed.

Relief should not be granted; for so much of the Equity of the bill as depends upon the mistake of the Attorney at law is *res adjudicata*. The other matters of equity averred, were susceptible of decision in the court of law below, and existing within the knowledge of the administrator (the plaintiff in error) before a confession of judgment was made by his attorney. They should have been plead. They could have been brought to the notice of the court by a plea of *puis darrien continuance*.—*Le Gueu vs. Gouverneur*, 1 *Johns. Cases*, 465; *Simpson vs. Hart*, 1 *Johns. Ch.*; *Hughes vs. Blake*, 6 *Wheat. Rep.*; *Drewry on Injunctions*, 65.

A party who has mistaken or misshapen his defence at law, cannot require relief in Equity.—*Evans vs. Solly*, 9 *Price*; *Exc. R.* 525.

Inattention, omission, or neglect, however fatal the consequences may be, is not of itself an equitable ground of relief against a judgment at law. Equity will not interfere where there is *crassa negligentia* on the part of a defendant at law.—*Bateman vs. Willoc*, 1 *Schoales and Lefroy* 217; *Protheroe vs. Forman*, 2 *Swanst.* 244; *Penny vs. Martin*, 4 *Johns. Ch. R.* 566; *Dodge vs. Strong*, 2 *Johns. Ch. R.* 228.

The doctrine that the creditors of the firm must first exhaust the joint property, before they can reach the separate property of the intestate partner, and then only in Equity, has not ever been recognized in Georgia—it would subvert the priorities established by the act of 1792.—*Prin. Dig.* 229. The doctrine is borrowed from the civil law originally. It is distinctly embodied in the bankrupt laws of England. It has not been universally adopted in America—it is not the settled doctrine in Courts

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of Equity.—*Cowell vs. Sikes*, 2 *Russell*, 191, 194, 196; *Story on Partnership*, 516, 517.

If it was a settled and undoubted principle, the defendants in error would have been entitled to proceed against the separate property of Bright, the deceased partner, having exhausted the joint property of the firm, or rather having had a return of *nulla bona* to their execution against Walker, the survivor.

LUMPKIN, Judge, delivered the opinion of the court.

If ever there was a clear case, I think the present is. The facts are these: James Bright and James Walker, a mercantile firm, trading under the name of Bright & Walker, executed a partnership note to Perkins, Hopkins and White. Shortly thereafter Bright died, and letters of administration were granted upon his estate to Alfred C. Bostwick. Suit was instituted by the payees of the paper against Walker, the surviving partner, and Bostwick, as administrator of Bright, jointly. The latter was released from the action, under the Statute of the State which exempts estates from suit for twelve months from the granting of administration. Judgment was rendered against Walker. In due time the case was recommenced against the representative of Bright, who, by his attorney, confessed judgment, and entered an appeal within the four days prescribed by the Judiciary. The appeal was dismissed, upon the ground that the right to enter it was not reserved in the confession. An execution issued, *de bonis testatoris*, upon which there was a return of *nulla bona* by the sheriff. The action was then brought against Bostwick, suggesting a *devastavit*, and a judgment obtained, charging him personally with the debt. *No plea was filed to either suit.* He now invokes the aid of a Court of Equity to relieve him, for the following reasons, to wit, That at the first term of the first action he set up no defence, because he believed that he had assets in his hands sufficient to pay the individual debts of Bright; but before the trial, several negroes belonging to the estate, and of the value of one thousand dollars, were carried out of the State by the persons to whom they were hired, without his knowledge, authority or consent. That he confessed judgment, *intending* to reserve the right of appeal, but that it was not done. That he did not attend court at the judgment term of the second action on account of the dangerous illness of his wife, and that judgment was awarded against him for the whole amount of the plaintiff's demand and costs. He alleges in his bill that he never received any of the partnership effects, and that he had no notice of the partnership debts. He offered to account for the value of the property run off, if the court should adjudge it right for him to do so; and upon doing this, prayed a perpetual injunction against the execution's being enforced against him *personally*. The defendants demurred generally to the bill for want of Equity, and it was dismissed; and we are called on to reverse that decision.

Were we to do so, litigation would be endless, and the maxim, *vigilantibus non dormientibus servit lex*, would be a nullity and a mockery. While the law is made for all, it will not, it cannot, protect those who neglect to take care of themselves. It affords no relief to such as sleep over their rights. They must suffer the consequences of their own want of watchfulness, however hard they may be. All parties are entitled to their day in court, time and opportunity of being heard. If they let these slip, or omit to

avail themselves of them at the proper stage of the proceeding, it is in vain afterwards to show that they had a good and available defence. It is too late to take advantage of it. And this general doctrine is too well established to be questioned, and, we may add, "too useful to admit of innovation."

Let us examine for a moment the reasons assigned by the plaintiff in error for not doing his duty. For of the law it may be truly said—that it "knoweth our frame," and is often indulgent to the infirmities of our nature, and will extend a helping hand to extricate us from our misfortunes—if it be practicable. He states that he omitted to plead, *plene administravit*, at the *docketing* term of the *first* action, because he then had in his possession assets enough to discharge the *individual* debts of his *intestate*. Admit the fact and how does it profit him? He was sued on a *partnership* claim; and allowing it to be true that *individual* property is primarily liable for *individual* debts, yet so far from that being any good excuse why he need not plead, it rendered it doubly incumbent on him to do so, if he would screen himself from personal responsibility on this *partnership* demand. If he forebore to file any plea, what, I ask, could prevent the plaintiff from getting an absolute and unconditional judgment, *de bonis testatoris*? Nor did the removal of the negroes before the *trial* term lessen the obligation to interpose the defence or interfere with it in the least. Moreover, a judgment by *default* can be opened at the *second* term to let in a meritorious defence. And as this *eloining* of the assets was *new* matter of defence originating pending the action, and *post ultimam continuationem*, it was good cause of plea *puis darrien continuatione*.

He avers in the next place, that he confessed judgment *intending* to reserve the right of appeal. Was this a secret design locked up in his own breast? It is not pretended that he communicated it, much less that he was prevented from perfecting his purpose by the misconduct of his adversary. Could not care and prudence have guarded against this neglect? Even if the injustice complained of was the result of ignorance, as is probably the fact, can equity interfere to relieve the sufferer? I apprehend not—*Ignorantia non excusa legem*, is still the stern mandate of the courts on this head. Men have been found subject to the penalty of laws which were never duly promulgated. And to the disgrace of our legislation, be it remembered, that there are numerous acts in our digests, which the citizens of Camden and of Rabun, residing several hundred miles from the capital, have been required to observe and obey at their peril "*from and immediately after their passage*." Not only must individuals endure the consequences of the slightest negligence or inadvertence, but of *mere ignorance* also.

As to the providential detention of Mr. Bostwick from the *trial* term of the *second* cause, it is extremely doubtful whether his presence could have effected any escape from the results of his past default. I am inclined to the opinion, that it could not. He had not only permitted himself to be bound hand and foot by the first verdict; but he had made no attempt, in the long interval which followed, to reverse that recovery, by a motion for a new trial, bill of review, or otherwise. How true it is, that our troubles may generally be traced to some imprudence or neglect

Were it necessary to fortify our opinion by authority, it is abundantly at hand. We will, passing by all others, quote a few decisions only, from our sister State of South Carolina—at present, second perhaps to none in the Union for judicial ability; besides, her institutions, as well as the habits of her people, are very similar to our own. In the case of *Maxwell vs. Connor*, (1 *Hill's Ch. Rep.*, 22,) Chancellor Johnston makes the following remarks: "If a defendant has been before a *competent* tribunal which has proceeded to *judgment*, that decision, *until reversed*, is conclusive upon him in every tribunal having concurrent or other jurisdiction. It is conclusive upon him as to any matter of defence, not only presented, *but which could have been presented by him*; and it is conclusive upon him, although the judgment be erroneous, if he acquiesced in it, and does not proceed to reverse it. It is conclusive upon him because, whenever a party is brought into court, *he is bound to full diligence*, which if he uses he will obtain his rights. If he neglects *either in putting in proper pleas* or introducing all his evidence to support them, he has no one to blame but himself; *nor will his neglect in one court be allowed to give him a right either in that court or another.*"

The Chancellor adds: "It is truly a hard case if a party entitled to relief in both courts, is repelled from both and is relieved in neither. *But the wholesome rule of law cannot for that reason be broken down. In that case ten would suffer for the one relieved.*"

The principles laid down in the case of Frances Micheau administratrix of Neil Brown, vs. A. A. Caldwell, administrator of George Chur, (1 *Spear's Rep.*, 277,) are exceedingly broad. Here a judgment had been obtained against the administratrix without any plea being filed—on account of the instructions to the attorney to put in the defence having been mislaid. It was conceded that there was no estate at all, and that the administration was taken out for the sole object of prosecuting a suit. The defendant moved to file the plea in the first case, which was refused, for the reason I suppose that it came too late, although that does not appear. On the suit suggesting a devastavit, she offered to prove there was no waste, by showing that the intestate was in utter destitution, not even leaving enough to pay funeral expenses.

But the Circuit Judge held that the first judgment against the administratrix was conclusive, and that it was too late now to prove that in reality there was no estate.

On the appeal, Wardlaw, Justice, in delivering the opinion of the court, says—"Her neglect to enter the plea was an admission of assets, which she cannot now retract without contradicting the judgment."

The decision of the court below was sustained, and the motion for a new trial dismissed.

Had the defence in the case at bar arisen subsequent to the *first* or even the *second* judgment, doubts might then have been entertained as to its admissibility. For in the case of *Cross vs. Smith* (in *East*,) Lord Ellenborough asserts that no case at law had been decided, where an executor who had "become once responsible for his testator's property, could be discharged as against a creditor, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed." No such question occurs here. The persons to whom the property was hired, are charged to have removed it

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some five or six years ago; no effort is made to recover it; and the singularity of this case is, that the administrator offers to account for the value of the negroes the removal of which is the sole ground of his appeal to chancery.

By the confession of judgment he admits assets to pay the debt. The return of the sheriff shows that they have been wasted. He has been legally and formally, and by default throughout on his part, convicted of a *devastavit*, and been made liable for the demand in controversy, *de bonis propriis*. And without submitting any satisfactory excuse for his neglect, he seeks relief by going into equity, and there alleging that a part of the intestate's effects, which he is willing to account for, having taken no steps to reclaim them, were removed intermediate the appearance and trial Term of the first action.

This naked narrative is enough; no argument or illustration could make it plainer. *Res ipsa loquitur*.

Let the decree of the court below be affirmed with cost.

No. 21.—WILLIAM D. WHITEHEAD vs. IRA PECK.

Per NISBET, Judge.

The action for money had and received is an equitable action, extensively remedial, yet it is subject to rules. It does not give to courts of law jurisdiction, which belongs to courts of equity.

It lies in a great variety of cases; but in no case, where there is not a contract, expressed or implied, between plaintiff and defendant; and there must be such a contract as creates a privity between the parties. It does not lie to enforce every imaginable equity between man and man, growing out of moneyed transactions.

It lies in all cases where money is in the hands of another, which, *ex æquo et bono*, the plaintiff is entitled to recover, and which the defendant is not entitled in conscience to retain. Yet this good and just right in the plaintiff, and this conscientious inability in the defendant, grow out of privity of contract either expressed or implied in law.

Usury paid by a surety may be recovered back by him, in this form of action, but not by the principal, though he has reimbursed the surety. There is no privity of contract either expressed or implied in law, between the principal and his creditor, in such a case.

If the surety have knowledge of the usury, and voluntarily pay it, he cannot afterwards recover it of his principal.

The payment of usury by the surety, and his subsequent reimbursement by his principal, do not, in law, constitute such surety the agent of his principal, by *ratification*.

Per LUMPKIN, Judge.

in a security, who is indemnified by mortgage, voluntarily pays a usurious note, is subsequently reimbursed by his principal, *in property*, the latter cannot recover of the creditor the excess of interest in an action for money had and received.

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This was an action of assumpsit for *money had and received*, the object of which was to recover usury back, tried before Judge Scarborough in Twiggs Superior Court, April Term, 1846.

It appeared in evidence on the trial, that in the early part of the year 1838, the plaintiff, through Henry Bunn, borrowed from the defendant \$2,940, and gave his note, with Bunn as his security, for \$3,500, to fall due on the 1st of January, 1839. That he renewed, for the year 1839, by giving a note for the usury of \$700; and for the year 1840, by giving a note for the usury of \$840. The note for the original loan, and also those given in renewal, were made payable to the defendant, and were subscribed by the plaintiff as principal, and the said Bunn as his security, whom the plaintiff secured by mortgages on property.

Before the maturity of the last note, given in renewal, Bunn took up from the defendant all of the said notes, amounting, in the aggregate, to \$5,040, principal, and shortly afterwards, the plaintiff reimbursed him in property, and the notes and mortgages were given up and satisfied.

After the close of the evidence and the argument of counsel, the Judge of the court below charged the jury, amongst other things, that if Bunn paid defendant, even before the maturity of the note, and, subsequently, the plaintiff paid Bunn, to indemnify him as surety, plaintiff must fail in his action. That if plaintiff had paid Bunn, before he, Bunn, paid defendant, the law implied an agency of Bunn to plaintiff; but that here the proof was, that plaintiff paid his security after the security had paid the creditor. If a security pay an usurious contract, and subsequently, his principal pay him back the amount so paid upon the contract of suretyship, an action cannot be supported by the principal debtor against the principal creditor, for money had and received. That a security was not compelled to plead usury, but might pay the whole amount, and recover of the principal for so much money paid to his use. And the jury, under the charge of the court, found for the defendant.

To which the plaintiff's counsel excepted.

J. S. DENNARD, for the plaintiff in error.

This is an action for money had and received. It is an equitable action. "It is deemed a species of equitable suit, and lies in all cases where, in *equity and good conscience*, the plaintiff ought to have the money he seeks to recover, and the defendant ought not to retain it."—*Archb. N. P.*

In the language of Lord Mansfield: "This kind of equitable action, to recover back money, which *ought not in justice to be kept*, is very beneficial, and therefore much encouraged," &c.—2 *Burr.* 1012. Again, Lord Mansfield said, "I am a great friend to the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice. It is a liberal action, founded upon large principles of equity, where the defendant *cannot conscientiously* hold the money."

Justice Buller said, "The Court has very properly extended the action for money had and received; it is founded on principles of justice, and I do not wish to restrain it in any respect; but it must be remembered, that it was extended on the principle, of its being a *Bill in Equity*. And, therefore, in order to recover money in this form of action, the party must show that he has *equity and conscience* on his side, and that he could recover it in a court of equity."

Now, as to the equity in this case, What would equity require Whitehead to do? To pay the principal and legal interest. That he has done. He has gone farther; he has paid the usurious interest also. He has done more than the broadest principles of equity could require. He stands before the court with clean hands, and asks equity. He asks for a recovery of that which has been extorted from him, contrary to equity, to conscience, and to law, and which the defendant in good conscience

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ought to refund. And is it to be denied him? if so, upon what grounds? Because his security voluntarily paid it, with full knowledge that he was paying a debt contrary to conscience and to law? But it may be said that Bunn, the security, was responsible to Whitehead. Not so. Is it money which Peck is retaining from Bunn contrary to conscience? Is it money which Peck in conscience ought to refund him? Has Bunn any right *ex æquo et bono* to it? Is he the victim? Has he been the sufferer? His own testimony is, that Whitehead has paid him every dollar that he paid Peck. Who received this money, who has been benefited by it, and who is now reaping its benefits? Not Bunn. He did not make, or lose a dollar by it. But Peck is the one who received it, who now has it, and who ought not in conscience to retain it. If he ought not in conscience to retain it, who ought in conscience to have it? Not Bunn; he has no legal right to it. It is not his money. He paid it, it is true; but he paid it for Whitehead's use, and Whitehead reimbursed him. It is therefore Whitehead's money, in whom conscience, equity, and law, have vested the right.

I have referred to the liberal and equitable principles governing this action, as laid down by the English authorities. I will now refer your Honors to some American cases, which, instead of restraining those just and liberal principles, have extended them.—20 *John. Rep.* 293; 6 *Peters' Rep.* 19. Also in 17 *Mass. Rep.* 579, C. J. Parker says, "There are many cases in which this action is supported, without any privity between the parties other than what is created by law. Wherever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has equitable or legal ground for retaining it, the law creates the privity and the promise." Now, I ask, where has Peck shown any legal or equitable ground for retaining Whitehead's money? We prove that he has it. C. J. Parker says further, "As to any want of privity, or any implied promise, the law seems to be, that where one has received the money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over."—17 *Mass. Rep.* 562.

In the first transaction between these parties, Judge Scarborough decided Bunn was an agent. If an agent in the first transaction, he was in the last; for Lord Mansfield has decided, "that payment by one is payment for all; the one acting virtually as agent for the rest; and, in the same manner, an admission by one, is an admission by all."—*Balantine on Limitations of Actions*, 203.

The law fixes upon Bunn an agency, and only an agency in this whole matter so far as his acts are concerned, and it matters not whether he is considered the agent of Whitehead or of Peck, Whitehead is entitled to a recovery in this action. Agreeably to the decision of Lord Mansfield, cited in *Bal. on Lim.*, Bunn, in paying the debt, was the agent of Whitehead. Then, agreeably to Lord Mansfield's decision in the case, cited in 2 *Cowper*, 808, where a man pays money by his agent which ought not to have been paid, either the agent or the principal may bring an action to recover it back. Either Bunn or Whitehead, therefore, could have brought the action against Peck.

"I admit," says Lord Kenyon, in the case of *Exall vs. Partridge and others*, 8 *T. R.* 309, "that where one person is security for another, and compellable to pay the whole debt, and he is called upon to pay it; it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the security did not pay the debt by the desire of the principal."

Why is it that a security can recover from his principal? What reason does the law give? Because he has paid money to, and for the use of his principal. Does not this law make the security an agent, and does it not base his right of recovery upon the ground of his agency? Here the security, Bunn, paid Peck, the creditor, and the law says he paid him for the use of Whitehead. If he paid him for the use of Whitehead, Peck became the trustee of Whitehead, and now holds the money for Whitehead's use.

WILLIAM S. ROCKWELL, for the defendant in error.

The judges not being unanimous, they delivered their opinions *seriatim* as follows:—

IPKIN, Judge.

Whitehead vs. Peck.

William D. Whitehead borrowed of Ira Peck a large sum of money at usurious interest, and gave Henry Bunn as security; executing under his hand and seal, several mortgages on real and personal property to Bunn, to save him harmless in the premises. Bunn discharged the *whole* of the debt; a part of it before it was due. Whitehead, when called upon, reimbursed his security in *property*. The borrower now brought an action for money had and received against the lender, to recover of him the usury thus paid. Judge Scarborough, before whom the case was tried, in Twiggs Superior Court, decided that the suit could not be maintained, and to reverse this judgment, this writ of error is brought. The plaintiff in error insists that the payment by the security was a payment by the principal; the security being in law the agent of the principal, *quoad hoc*.

It may not be unprofitable to advert briefly to the history of usury. The Jews were permitted to lend to *strangers* upon usury, but it was not lawful for them to charge a *brother*—that is an *Israelite*—any interest.—*Deut.*, xxiii., 19 and 20. The Romans allowed interest, but whether, at the time of the Twelve Tables, it was *one* per cent. or *twelve* per annum, is still a vexed question. Tacitus, Gibbon and Pothier are authorities in behalf of the former opinion; Livy, Montesquieu and others of the latter. Anciently, in England, as in all other Catholic countries, not only was *all* interest prohibited, but the taking of increase on money was denounced as contrary to the laws of God, of nature and of the realm. Having been tolerated among the descendants of Abraham, however—at least so far as to authorize it to be assessed on Gentiles—it would seem that it could not be in itself sinful. Ever since the Reformation, the taking of interest has been expressly sanctioned by the British Parliament.

The Act of 37 *Hen.* 8, *Ch.* 9, (A. D. 1546,) was the first in England upon this subject; it allowed 10 per cent. It was repealed in 1551, but revived by the 13 *Eliz.*, *Ch.* 8, (A. D. 1570,) and 10 per cent. was again the lawful interest. By this last statute all contracts are declared void which reserved more than the lawful interest on money. The 21 *James* 1 (1623) reduced the rate of interest to 8 per cent.; and 12 *Charles* 2 (1660) to 6 per cent.; and 12 *Anne* (1713) to 5 per cent.; and any one violating its provisions incurred a forfeiture of treble the sum lent.

Usury has been viewed very differently, not only by the different States of the Union, but at different periods of the respective history of the same State. In some it has been treated with great rigor, the law uniformly looking upon the borrower as the *victim*, and in no sense the *aggressor*. In most of them there is a gradual relaxation respecting it; and in some, they allow not only the principal and legal interest to be recovered, on usurious contracts, but suffer the parties to agree upon a higher rate than the lawful interest, under a certain maximum limit; and this is denominated *conventional* interest.

It sounds very well to say of this practice, that men should be protected from it, *even against themselves*. But the tendency of legislation is, to call in question that assumed guardianship which trenches upon freedom of action, by superintending and controlling the contracts of parties of sufficient age and understanding to make them, and transact business with their eyes open. "One thing is very certain," says

tice McLean, in delivering the opinion of the Supreme Court, in the case of *Lloyd vs. Scott*; "namely, that the Act of Usury has long since lost that deep moral stain which formerly attached to it, and is now generally considered only as illegal, because it is prohibited."

The plea of usury was rare in the South previous to the late revulsion in monetary matters; and since 1837 it has been restricted pretty much in Georgia to particular districts of the State. In one way I am satisfied that it has operated beneficially; that is, in driving capital into internal improvements—agricultural, manufacturing, and industrial pursuits. Still I see no sufficient reason for singling out money-lenders and heaping opprobrium upon them as the greatest culprits in the community. They may be as inexorable as Shylock, and the more selfish and callous, from the fact that they earn their living by dealing directly in money, the love of which is the root of all evil. But observation has convinced me, that *all* who *will be* rich, whether usurers or land-jobbers or speculators or any other class, they that *will be rich*, that have made up their minds to accumulate property, aside from the ordinary employments of life, fall, not only into divers temptations and snares, but soon become almost, if not altogether, regardless of the means by which they seek to attain their end. The evil resulting from the prevalent practice of pleading usury is, greatly to weaken the sense of obligation for the performance of contracts generally, and to demoralize individual character. Sitting as a court, we have nothing to do but to carry into execution, calmly and dispassionately, the will of the people as disclosed by the laws upon this subject. With the justice or injustice, policy or impolicy, morality or immorality, of these laws, neither jurors nor judges may interfere.

Our first provincial Act against usury was passed in 1759. It fixed the rate of interest at 8 per cent.—at which it continued down to 1845—almost a century. It embraces substantially, the various provisions of the several English statutes then in force. The act of 1814, only prescribed the mode of computing interest, and did not affect at all, the question of usury. The act of 1822 made a material innovation on the old law. It declared expressly that usurious contracts *should not be void*, but that the principal due thereon should be recoverable *at law*, and no more. The 2d Sec. relieves the lender from all forfeiture. Under this act, it may well be seriously doubted whether usury *voluntarily* paid, can be recovered *of*, or *by* anybody. Under the act of 1759, it was clearly recoverable, because paid upon an illegal and void contract. "It has been said," observes Lord Bacon, (7 *Bac. Abr.* 204) "that though the statute does not go so far as to make the party receiving the usurious interest liable to refund, yet having prohibited taking beyond such a sum *and avoided the contract*, the taking is a breach of the statute, and the actual receipt of the money will (in a Court of Equity) make him liable to refund," (*Cas. Tem. Talb.*, 38 & 114.) Now we yield our entire assent to this proposition. And had the 1st sec. of the act of 1822, simply declared that the principal *only* of usurious contracts should be recoverable at law and no more—still these contracts having been rendered void by the act of 1759, extra interest paid thereon might have been collected. But this suggestion is met by the broad enactment, that such contracts, although they may provide for the payment of a larger premium than 8 per cent. for the loan of money, are nevertheless, not on

that account void. What then? Can the borrower, if he pay the money of his own accord, get it back? Upon what principal can he reclaim funds advanced on a *valid* contract? If he refuse to fulfill his promise, and suit has to be brought in that court, the *principal only* can be recovered, and this would appear to be the only risk which the creditor runs. The act of the last General Assembly, reducing the rate of interest to 7 per cent., changes vitally the phraseology of its predecessor of 1822. It pronounces usurious contracts *absolutely void, and of no effect*, except so far as to authorize the recovery of the principal due thereon, and no more. Under the act then of 1822, is not the party brought within the principle *volenti non fit injuria*? Were this a new question; I should incline strongly to that construction, and that Mr. Whitehead would be remediless, had he paid the excess himself to Mr. Peck; and a *fortissimo* when it was paid by another. A contrary contemporaneous interpretation having been established by the courts, and received and recognized as the law of the land for nearly a quarter of a century, this court felt unwilling to disturb it. In the case of *Winkler vs. Scudder*, (decided during the present term, see p. 108,) it acquiesced in the prevailing construction. I shall proceed, therefore, to examine this case on other grounds: for while it is conceded that this court has the right and authority to consider any point, so far as settled by our domestic adjudications, *only as res integra*, and to expound the law for itself, and will exercise them whenever the occasion demands it; yet when a principle has been settled, by a long series of decisions, and uniformly sanctioned throughout the various circuits, and has governed the conduct and regulated the business of our people for a length of time, it would almost have acquired the force of a law; and, if abrogated, better that it should be done by the law-making department of the government.

I had great doubt upon the hearing of this cause. My mind is now better satisfied, although not free from embarrassment.

It is assumed by counsel for the plaintiff in error, and very correctly, that the action of assumpsit is likened to a bill in equity, and is the proper remedy, wherever the defendant has received and obtained possession of the *money of the plaintiff*, and which in equity and good conscience he ought to pay over, the *plaintiff having the legal right to demand the same*. Was the money sued for, the *money of Whitehead*? If so, Bunn, offered as a witness by the plaintiff, and the only one introduced, *perjured himself*, for he swore that he paid the debt to Peck with *his own money*, which was afterwards replaced by Whitehead, *in property*. Here then is one difficulty in the case. But there are others. Had the debt to Peck been discharged directly by Whitehead, *in property*, his right to recover for money had and received would be very doubtful. The authorities all concur that the payment, to entitle the plaintiff to succeed in this form of action, should originally have been made in money, or that which the parties have agreed to treat as money—or, if originally goods, sufficient time must have elapsed with the concurrence of circumstances, to justify the inference that they have been converted into money.—*Peake's. Cas.* 43; 4 *T. Rep.* 687; 3 *Bos. and Pul.* 589. In *Taylor vs. Higgins*, (3 *East* 169,) the Court of King's Bench say, "It seems to be a rule, that under a count for money paid it must appear that money was actually advanced." Lord Mansfield, whose *liberality* of view was proverbial, always

making mere technicality yield to the justice of the case, in *Nightingale et al. vs. Devisme*, (5 Burr. 2592,) says, "We are all of the opinion that the action for money had and received for the use of the plaintiff, will not lie in the present case, where no money was received. The proof in this case was that 500*l.* of East India stock had been transferred to the defendant for the use of the plaintiff.

The same doctrine is held by the court of appeals in Kentucky, in the case of *Lucket vs. Bohannon*, (3 Bibb, 378,) which was an action of assumpsit for money had and received.—See also 8 *Johns. Rep.* 202. Some modern cases have decided that this species of action could be maintained where bank bills or bills of exchange had been received, but it was on the ground that they were money.

The rule thus established is founded in wisdom. Suppose that Whitehead had compounded with Peck, and settled with him at fifty cents on the dollar, or any other sum less than the principal and legal interest, or, what is equivalent in principle, had transferred to him property in satisfaction of the claim, at fictitious prices, more than double its real value, could he have maintained this equitable action for the usury thus nominally accounted for? I apprehend not; nor can Whitehead escape the rule, because he sold the property to Bunn instead of Peck. Whitehead conveys to Bunn certain property in discharge of his own indebtedness (and that too by mortgage) to the purchaser, and then seeks on that consideration to raise a liability from Peck, for money had and received to his use; or, to present the proposition in a different form: Peck, it is alleged, has received of Bunn money, which he ought not in justice and good conscience to keep. Whitehead has reimbursed Bunn in property and, therefore, Whitehead is entitled to recover back, not his own, but Bunn's money from Peck. With all possible respect for the argument, I must think that this is a *non sequitur*—a conclusion not warranted by the premises. It by no means follows that every one who gets money illegally is bound to refund it. Had the usury in controversy been collected by judgment and execution, the impropriety of withholding it would be just the same as before the action was brought, and yet it will not be pretended that it could be then reached. The law in its humanity goes far to extricate the unfortunate borrower, even from the ruin which he has wilfully brought upon himself. It knows our infirmity, and compassionates the situation of the debtor, who, deluded by hopes of better times, will consent to any terms, and seize with avidity upon any proposition, however exorbitant, provided it affords the means of present relief. And yet, if the borrower neglect or refuse to avail himself of his defence when sued, the courts, anxious and astute as they are to detect and prohibit the enforcing of usurious contracts, will close their doors against his prayer for relief, and turn him off to battle it as best he can with his unfeeling creditor. If money then illegally obtained may be withheld from its true and rightful owner, much less shall it be subject to the suit of any one who sees fit to demand it.

Bunn, constrained by an honorary obligation, more sacred in the opinion of many men than any mere legal sanction, being willing and able to pay, and feeling, under the circumstances, that he would be disgraced by refusing to pay—as the money was lent upon the confidence reposed in —(he negotiated the loan, says Judge Scarborough, in his written

opinion—Peck saying that he would have nothing to do with Whitehead, when applied to by Bunn to get the money,) discharged the debt to Peck with a full knowledge of its original turpitude. He had ample notice of the taint which attached to it. He did it without compulsion of law. If there be guilt in the transaction, he is completely identified with it—in its inception—in its consummation. That Whitehead might have resisted a recovery, at the instance of Bunn, I am quite clear; notwithstanding the decision in *Ford vs. Keith*.—1 *Mass. Rep.* 139. That he might not still have recourse on Bunn, if the facts of his case do not otherwise bar him, I am not fully convinced.—See *Reed vs. Smith*, 9 *Cowan's Rep.* 647; *Kent vs. Walton*, 7; *Wend. Rep.* 257. But that he has sought his remedy of the wrong person—of one to whom he never paid a dollar, either personally or by attorney—is the deliberate judgment of this court, after the most thorough reflection upon the case.

But it is urged, and with much plausibility and earnestness, that Bunn acted as the agent of Whitehead, in the settlement of the debt; and this is implied from the fact of his securityship. But Bunn himself, in his testimony, expressly repudiates the agency; and does not every feature in the transaction corroborate his proof? Does he not demand reimbursement at the hands of his principal? And does not this fact negative the imputed relationship? Did he not assert his rights as mortgagee, upon forfeiture of the condition in these instruments to protect him as *security*? And does Whitehead attempt to oppose his claim, upon the pretext that he acted merely as his substitute in the transaction? On the contrary does he not recognize and discharge it by a surrender of the property? And this position is greatly strengthened by the very ingenious suggestion of the learned counsel for the defendant, namely: that Bunn's remedy by assumpsit against Whitehead, for money paid, was merged in the higher security, by mortgage; and that the settlement of that *specialty debt* by Bunn and Whitehead, in *property*, could have had no legal connection with the settlement of the simple contract debt between Bunn and Peck. I think there is no foundation, from any rule of law so to consider it.—2 *Term Rep.* 100; 8 *Taunt.* 365.

But, surmounting all those obstacles, the plaintiff in error, I think, must fail for want of the necessary *privity* between himself and Peck, to enable him to maintain his action. It is unquestionably true, as a general rule, that a *stranger* to an agreement cannot sue in his own name.—*Williams vs. Everett and others*, 14 *East. Rep.* 582. But there are exceptions to the rule; and it has been decided that it is immaterial from whom the consideration passed, if it be a sufficient foundation for a valid promise. If A delivers money to B for the purpose of being paid over to C, C may maintain an action against B for the money. The person to whom the promise is to be performed, though not the party contracted with, being the meritorious cause of it, can take advantage of the promise.—*Con. Rep.* 443; 3 *B. and P.* 149, n. (a); 2 *D. and R.* 277; 4 *B. and C.* 664; 17 *Mass. Rep.* 575, 579; 3 *Pick.* 92; 13 *John. Rep.* 497; 22 *Am. Jur.* 16, 19; *Chit. on Plea*, 5; *Chit. on Con.* 45, 48; *Ham. on Par.* 8, 9; *Story on Agency*, 393, 394. But the obvious answer to all those cases is, that the *money*, or *property*, sued for belonged to the plaintiff. It must be proved either that the plaintiff was the person with whom the contract was made, or that he was the party legally and really interer

in it when made.—1 *East*. 497; 8 *T. R.* 332. Plaintiff having an equitable interest in the contract is not sufficient; therefore a *cestui que trust* cannot sue.—*Allen vs. Jenlett, Holt*, c. 641. Money deposited with a stakeholder can only be recovered from him by the person *legally* entitled thereto.—13 *East*. 20. The plaintiff, Whitehead, had no *legal right* to the money paid by Bunn to Peck. In one sense, it is true that it was paid *to his use*, as it was appropriated to the joint note of Whitehead & Bunn, but not *to his use*, in the meaning and spirit of the foregoing cases. Whitehead had no agency nor participation in the transaction between Bunn and Peck. As to the idea that the subsequent settlement, upon the mortgages, was a ratification and adoption of the previous agency, installing Whitehead into the shoes of Bunn, and thereby constituting him the creditor of Peck—the fallacy of it, as I humbly conceive, lies in identifying principal and surety with principal and agent; relations which, in point of law, are very dissimilar. Agency must be antecedently given, or be subsequently adopted; and, in this latter case, there must be some act of recognition.—2 *Kent Com.* 614. *But where the act of the agent is intended to affect a third person, it is necessary to prove an express authority given to the agent at the time he acted, and no subsequent sanction of the principal will give it effect.*—5 *East*. 498; 3 *Chit. Com. L.* 206. The rule of law, that *omnis ratihabitio, retro trahitur*, &c., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot, in the mean time, depend on whether there be a subsequent ratification.—5 *East*. 500. A person, by an assumed agency, and without any assent or acquiescence to the act, cannot bind another, *nolens volens*, however useful and necessary the act may be. But a surety has a right to see to it that the debt for which he is bound is paid. And if he satisfies the creditor, to relieve himself, which he may do without the consent of his principal, still it is money paid for his use, to recover which an action will lie. Does the relation of principal and surety create such an agency that the acts and admissions of the latter would bind the former, though he should subsequently so far confirm the deed of his surety as to refund the money paid on his account? Numerous other points of dissimilarity might be adduced, but we forbear.

The court is of the opinion that as neither principal nor security was bound to pay the excess of interest, Bunn, by *voluntarily* paying money upon a usurious agreement, which he himself had negotiated, could not compel Whitehead to refund. It could not be money paid to the use of the principal, as Bunn paid it with a full knowledge that it was illegal. That without notice from his principal, forbidding its payment, he was under obligation at his peril to resist it. And without expressing any opinion as to what might have been the rights of Whitehead as against Bunn, had the payment to him been *in money* and not *in property*, we hold that Whitehead cannot maintain *assumpsit* against Peck, for money paid to Peck by Bunn, and which it is not pretended was the money of Whitehead, merely because Whitehead afterwards discharged, *in property*, the liability imposed upon him by operation of law in favor of his security. No precedent has been produced to warrant such a proceeding.

Wherefore the opinion of the court below must be affirmed.

NISBET, Judge.

Upon the question made in this case, very little direct authority is to be found. It is to be decided, therefore, upon general principles. The court being compelled to give judgment at Hawkinsville, before the expiration of the Term, and having then access to but few books, I felt great doubt as to the correctness of the judgment rendered. That doubt was strengthened by the dissentient opinion of my learned brother, Warren. Since I have had an opportunity of looking into the subject with some carefulness, I have become reconciled to the judgment, and although there is obviously in the case some conflict of principles and authorities, I must think the judgment of the court was right—right both upon principle and authority.

The facts are few. Whitehead, the plaintiff in error, through Bunn, who was his surety, negotiated a loan from Peck, the defendant, at usurious interest. Before the maturity of the note, and with knowledge that it was tainted with usury, Bunn paid it in full to Peck. He was at the time secured against loss as surety, by a mortgage from Whitehead, his principal. After payment to Peck, Whitehead reimbursed Bunn in property. These facts establish that the contract was usurious; that Bunn had knowledge of that fact, and that the payment by him of the usurious interest was voluntary. Whitehead brought his action of *assumpsit*, for money had and received, against Peck, for the usurious interest paid by Bunn. The question is, is he entitled to recover? I think he is not. This I know is an equitable action, and is extensively remedial, yet it is subject to rules. It does not give to courts of law jurisdiction which belongs to courts of equity. It lies in a great variety of cases, but in no case where there is not a contract, express or implied, between plaintiff and defendant; and there must be such a contract as creates a privity between the parties. It does not lie to enforce every imaginable equity, between man and man, growing out of moneyed transactions. It lies in all cases where money is in the hands of another, which *ex æquo et bono*, the plaintiff is entitled to recover, and which the defendant is not entitled, in *conscience*, to retain. Yet this good and just right in the plaintiff, and this conscientious inability in the defendant, grow out of privity of contract, either express or implied, in law.—1 *Wheat. Selwyn*. 103; 14 *East* 582; 4 *B. & Ad.* 612; 1 *Cr. & Jor.* 83; 17 *Mass.* 579; 7 *Taunt.* 339; 1 *R. & M.* 68; 3 *R. & A.* 643.

Between Whitehead and Peck, there is no express contract. Is there any implied in law? In cases where the borrower pays the usurious interest himself, the statute against usury, and the fact of payment, create a contract. There is in the transaction a direct relation between the parties, viz: privity. The money is paid by the plaintiff, and is received by the defendant for his use. It is the money of the plaintiff which he holds, and it being received, against the statute of usury, he cannot retain it in conscience. *Ex æquo et bono*, the plaintiff is entitled to it. In that case, the borrower could certainly recover. Upon the note, there is a contract between Whitehead the maker, and Peck the holder, so long as it remains in his hands. But so soon as the surety steps in and pays the debt, Peck is entirely dismissed from it—his rights in it cease, ar

the surety is subrogated to all the rights of the holder. This position is not necessary to be sustained by authority ; so that the payment by the surety, so far from creating a privity between the maker of the note and the holder, does in fact destroy that which before existed. It does more : it creates new relations between the surety and the holder, incompatible with the plaintiff's right to recover. There is a contract implied in this case, between the surety and the holder, by virtue of the statute and the fact of payment ; a direct relationship which constitutes privity. It is the money of Bunn, the surety, which Peck has received, and he has received it to Bunn's use. The unconscientiousness of the retention of it, has reference to Bunn, and not to Whitehead. The indebitatus is as to him, and it is to him that the law makes the assumpsit. What reply could Peck make to an action for the usurious interest by Bunn ? I know of none which would be available. Bunn, if sued by Peck, the lender, on the usurious contract, could plead the usury, (*Blydenburg*, 107,) and if so, having paid it voluntarily, he can recover it back in an action for money had and received. It would not be competent for Peck to plead that Bunn had been reimbursed by Whitehead. He would not be permitted to go out of his own contract with Bunn, and inquire into his (Bunn's) relations with his principal, for a defence. If Bunn, being reimbursed by Whitehead, should still recover the usurious interest out of Peck, what then ? Why, then an action would probably lie for it against him in favor of Whitehead. Whitehead would at all events have an equity in this money, which he could assert in chancery or at law. Now, can the payment of the money create, by implication, two contracts at the same time ? Can this usurious interest be recovered both by Bunn and Whitehead ? Is Peck liable to Bunn, and if he is, is he also liable to Whitehead ? Can he be liable to both, at one and the same time ? I apprehend he cannot be. And this view of the matter satisfies me that there is no contract, no *privity*, between Whitehead and Peck, and that the former ought not to recover against the latter. If this question be tested by the rules of pleading and evidence, I cannot perceive how the plaintiff could ever make out his case against the defendant. The facts do not expressly, or by implication of law, create an assumpsit on the part of Peck. Without *that*, the action of assumpsit cannot be sustained. Again, one of the first rules of pleading is, that the action shall be brought by him who holds the legal interest in the contract. If I am right in my view of the subject, Bunn, the surety, has the legal interest here. The plaintiff by his own evidence has shown this, according to my view of this record, and has therefore proven himself out of court. It has been stated already that a surety, having paid the debt of his principal, is subrogated to the rights of the creditor against him. He cannot, however, be subrogated to more than the creditor's rights. The creditor could not have recovered the usurious interest from the maker, if he (the maker) had plead the statute of usury, in an action upon the contract. Could, therefore, Bunn have recovered this excess of interest out of Whitehead, his principal ? Was it not his duty to have awaited a suit, and plead the usury ? Knowing, as he did in this case, that the contract was tainted with usury, was not this necessary to his own protection ? And was not his voluntary payment of the usury an act of his own wrong, which would pre-
him from recovering it from his principal ? We have seen that

the surety may set up the defence of usury. In a case like the present, where the surety is cognizant of that defence, it strikes me that he fails to make it at his peril.

The rights of the principal are involved. The surety had no right by a voluntary payment to charge his principal with usurious interest. It was competent for him to protect him, and it was his duty to do it. Suppose that Whitehead had not refunded to Bunn the illegal interest, and he had sued Whitehead for it, could not the latter have plead Bunn's knowledge of the usury in the contract, and his obligation to have set it up in defence against the creditor? It is so decided in several instances, and decided contrarywise in one case in Massachusetts. Blydenburg holds this language, upon the authority of what is called *Potkin's case*, 8 *Leonard*, 63; to wit: "But it seems that if the surety of the borrower at usurious interest have an opportunity to make his defence in a suit upon the original usurious bond, and omit to plead, he cannot afterwards recover of the borrower upon his counter-bond of indemnity, but shall be punished for his neglect."—*Blydenburg*, 102. In *Cro. Eliz.* 588, a precisely similar case was decided contrary, but upon the ground that the surety might not have known of the original contract being usurious, in time to make his defence, sustaining the position, that if he had known of the usury in time to plead it, he could not have recovered against his principal.

Justice Glanville, upon the authority of Noy, is reported to have said, "It would be a dangerous precedent to avoid the statute of usury; for the surety might be a friend of the usurer, who would not plead the statute, and so the statute would be to little purpose."—*Blydenburg*, 102; *Noy*, 73. It is something more than surmised that in this case the surety was the friend of the usurer. The writer on usury, Blydenburg, before quoted, remarks that the principle of Potkin's case has been followed in the United States. It was followed in *Moore's Exrs. vs. Vance*, 3 *Dana*, 362. In *Ford vs. Keith*, 1 *Mass.* 139, it is decided that the surety may recover against the principal the usurious interest voluntarily paid. In this case, the counsel for the plaintiff in the argument put his right of recovery on the ground that he had no notice of the usury, and therefore could not have plead it. The court, however, ruled that with or without notice he could recover. It does not seem to me that this authority is consonant with reason; it is in conflict with the common law. Now, if I have shown that Whitehead might have successfully defended himself against the recovery of the usurious interest on the part of the surety, it follows that his voluntary refunding it to him, was an act in his own wrong from which he can take no benefit; and it farther results as a consequence of this wrong act, that he has no equity against Peck, the lender. It is not true, *ex æquo et bono*, that he is entitled to this money at the hands of Peck.

But it is argued that this case turns upon the doctrine of agency; that Bunn acted in paying the debt as Whitehead's agent, and therefore it is his act; that a subsequent ratification is the same with a prior appointment, and that the maxim "*omnis ratihabitio retro trahitur et mandato priori æqui paratur*" applies. The doctrine of ratification is not questioned, but it is not apparent how the law of agency can govern this case. If, indeed, Bunn was Whitehead's agent, the privity is established, and

the action is sustainable. But it does not appear from the facts disclosed by the record, that he purported to be his agent, or that he assumed to be his agent, or that he was considered by Peck his agent. On the contrary, it does appear that he was his surety; that he was equally bound with him to Peck; that in consequence of this liability, acting for himself and in his character of surety, and with a view to his own protection, he made this payment. Now, is it possible that the subsequent reimbursement by Whitehead can abrogate all the relations of the parties, or set them aside, and introduce new relations? By what law are the rights of these parties determinable? By the law of principal and surety, or that of principal and agent? They are manifestly different, viewed as principal and surety, from what they are as principal and agent. To subject them to the law of both relationships would be an absurdity. We must elect between the two. And can we presume an agency, to the exclusion of all the rules which are so well settled, as applying to principal and surety—maker and endorser? If, in this case, the court can travel out of the record, and presume an agency, then may courts of justice do the same thing, in every case where a surety or an endorser takes up the paper of his principal. Had a stranger to the contract volunteered the payment of the debt, usury and all, and Whitehead reimbursed him, he would have been an agent by ratification, and this action would lie. Since Bunn was no stranger to the contract, but a party to it, and as there was no evidence of his acting with the means, or by the authority of Whitehead, we must presume that he acted on his own account, and with a view to his own interest.

Whereupon the judgment of the court below was affirmed.

WARNER, Judge, dissentient.

I cannot concur in the opinion delivered by the majority of the court in this case. It appears from the record, in the fore part of the year, 1838, Peck, the defendant, advanced as a loan upon the note of plaintiff, with Henry Bunn, security, the sum of \$2,940 00, the note being drawn for the sum of \$3,500 00, payable to Peck, the defendant, to become due on or about the 1st January, 1839. About the time the note for \$3,500 00 fell due, the plaintiff renewed, by giving a note for \$700 00, to fall due on or about the 1st January, 1840. The plaintiff renewed a second time by giving a note for \$840 00, to fall due on or about the 1st January, 1841; the plaintiff, Whitehead, indemnifying Bunn, his security, by mortgages on property. The amount of the first note for \$3,500 00, and the other two notes when added together, make the sum of \$5,040 00. Before the maturity of the notes given on the last renewal, Bunn as the security of the plaintiff, took up all the notes which had been given to the defendant by Whitehead as principal, and to which he was the security, amounting to the aforesaid sum of \$5,040 00; and afterwards, before the last note given in renewal fell due, the plaintiff, Whitehead, paid Bunn, his security, the aforesaid sum of \$5,040 00 in property. The plaintiff instituted his action for money had and received of the defendants, to recover back the usurious interest. There is no evidence as to the fact of the transaction being usurious. The defendants received a large amount of money, which, according to the laws of

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his country, he is not entitled to retain ; but it is contended, inasmuch as the defendant did not receive the usurious interest from the *hands* of the plaintiff, Whitehead, but from the *hands* of Bunn, his security, there is no *privity* between the plaintiff and defendant, from which the law will imply an obligation to repay the money. The court below charged the jury, "That if Bunn, plaintiff's security, paid Peck even before the maturity of the note, and subsequently, plaintiff paid Bunn to indemnify him as security, *the plaintiff must fail*. But if plaintiff had paid Bunn before Bunn paid defendant, Peck, the law implied an agency of Bunn to plaintiff, Whitehead ; but here the proof was, plaintiff paid Bunn, his security, after the security had paid the creditor."

Before I proceed to consider the charge of the circuit judge, I will for a moment advert to the legal character of an action for money had and received. The action for money had and received, is an equitable action. "Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund, it may be recovered from him in an action for money had and received to the plaintiff's use. This form of action has been of late years extended, on the principle of its being considered like a bill in equity ; and therefore, in order to recover on a count for money had and received, the plaintiff must show, that he has equity and conscience on his side, and that he could recover it in a court of equity."—*1st Leigh's Nisi Prius*, 44 ; *Moses vs. McFarlane*, 2d *Burrow's Rep.* 1012 ; *Straton vs. Rastall*, 2d *Term Rep.* 370. In *Moses vs. McFarlane*, it is said, "This kind of equitable action to recover back money which ought not in justice to be kept, is *very beneficial*, and therefore *much encouraged*. It lies for money got through imposition, express or implied, or extortion, or *oppression*, or an *undue advantage* taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances." In *Straton vs. Rastall*, Buller, Judge, says : "In conscience, he only who received the money ought to be obliged to pay it back ; and a court of equity would inquire in this case, *whether the party had received the money or not*."

In the case under consideration, there is no controversy as to the fact that Peck, the defendant, received a large amount of money by way of usurious interest, in payment of Whitehead's notes, from the hands of Bunn, his security, which the law forbid him to receive and retain. If this large amount of usury had been paid into the hands of Peck by the plaintiff himself, it is conceded the plaintiff, Whitehead, might have recovered it back in this form of action, the parties not being, in the eye of the law, *in pari delicto*. Would not a court of equity, on the facts disclosed by the record in this case, decree the payment of the money, now sought to be recovered, to the plaintiff ? Would not the fact that Peck had received the money in payment of Whitehead's note from Whitehead's security, which had been refunded to Bunn, the security, by Whitehead, raise such an equity in favor of Whitehead as would entitle him, in a court of equity, to a decree for the amount in the hands of the defendant, so wrongfully and unjustly received by him ? If it would not so decree, then I am frank to confess, I have been greatly mistaken as to the powers and duties of a court of equity. If a court of equity would decree the repayment of the money, on the state of facts presented, th

as we have seen, the action for money had and received is maintainable.

I will now proceed to examine the charge of the court to the jury. The court states the law to the jury to be, "that if the plaintiff had paid Bunn, before Bunn paid defendant, Peck, the law implied an agency of Bunn to plaintiff Whitehead." As I understand this part of the charge, the court intends to be understood as saying, that if Whitehead first paid the money to Bunn, and then Bunn paid it to Peck, Bunn paid the money as Whitehead's agent, and the plaintiff would be entitled, under the law, to recover, on the ground that payment by the agent is the same as payment by the principal. To this part of the charge of the court I yield my assent. But the court also charged, "that if Bunn, plaintiff's security, paid Peck, even before the maturity of the note, and subsequently, plaintiff paid Bunn, to indemnify him as security, *plaintiff must fail*." This part of the charge of the court, when applied to the facts of this case, necessarily defeated the plaintiff's right to recover. Was the charge of the court correct, in contemplation of law? I first propose to examine the question of *agency*, without regard to the relation of principal and security existing between Bunn and Whitehead. It is admitted, if Whitehead first paid the money to Bunn, and then he paid it to Peck, Bunn was the *agent* of Whitehead in making the payment. But is there any difference in law, between an *antecedent* authority given to make the payment by Whitehead to Bunn, and the *ratification* of the payment subsequently, of Bunn, by Whitehead?

The authorities recognize no such distinction, as will be readily discovered by reference to them. "If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it. But if, with full knowledge of what I have done, he ratify the act, he will be considered to have contracted originally, by my agency; *for the ratification is equivalent to an original authority*."—*1st Livermore on Agency*, 44; *2d Kent's Com.* 614; *2d Greenleaf's Ev.* 46; *Maclean vs. Dunn*, 15th *Com. Law Rep.* 129. The maxim of the law is, that "*every consent given to what has been already done, has a retrospective effect, and equals a command*." If Bunn, without the knowledge of Whitehead, advanced the money to Peck, and took up Whitehead's notes, and afterwards, with a full knowledge of all the facts, Whitehead ratified the transaction, as it appears he did do, by repayment to Bunn the full amount he had paid Peck, then Bunn was as much Whitehead's agent, in making the payment, as if Whitehead had first paid the money to Bunn, and then Bunn had paid it to Peck. In contemplation of law, Bunn was as much the *agent* in the one case as the other. Certainly, it does not lie in the mouth of the defendant to object, Bunn was not the agent of Whitehead, in making payment and taking up Whitehead's notes, when Whitehead himself has adopted and ratified his acts as such agent, and reimbursed him the full amount paid to Peck. But, it may be said, the payment to Bunn by Whitehead was made in property. If parties agree to take property in lieu of cash, it is a good payment.—*vs. Barnhill*, 1st *Hill's Carolina Rep.* 234. Payment of a debt, as surety or endorser, by conveying land which is received as payment, will support the count for money paid, laid out

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and expended.—*Ainslie vs. Wilson*, 7th Cow. Rep. 662; *Bonney vs. Seeley*, 2d Wendall's Rep. 481. The defendant, in this case, can derive no aid whatever from the fact, the payment by which Bunn was reimbursed was made in property. If the parties thought proper to treat the property as cash, they had a legal right to do so, and such payment, in judgment of law, will be considered as a *cash payment*. The payment of the money by Bunn to Peck, having been adopted and ratified by Whitehead, subsequently, and Bunnre imbursed therefor, Whitehead is entitled, both in law and equity, to recover the amount of usurious interest from Peck, who received it, equally as if the money had been paid directly by Whitehead to Peck, out of his own hand; and the attempted evasion of the law ought not, in my judgment, to receive the sanction of this court.

I have been considering this question as if the relation of principal and security did not exist between Bunn and Whitehead, at the time of the payment of the money; and have endeavored to establish the plaintiff's right to recover, on the ground that the payment to Peck was made by Bunn as the *agent* of Whitehead. Although there was no antecedent authority given to Bunn by Whitehead to make the payment; yet, his *subsequent* ratification of the payment by Bunn, and reimbursing him, was in law equivalent to an *original authority*, and the defendant, with the money in his pocket, could not question his agency, when Whitehead had ratified it. Does the fact that Bunn was the security of Whitehead in the least degree weaken his authority as agent in making the payment to Peck for Whitehead in a legal point of view? I think not; but, on the contrary, greatly strengthens it. The record shows that Whitehead was *principal* and Bunn the *security*, and that Bunn paid the money to Peck *as security for Whitehead*. If Whitehead was the principal debtor, and Bunn the security, and the money was paid by the security to Peck the creditor, such payment was, in contemplation of law, made *for the principal debtor*. "If one person is surety for another, and compellable to pay the whole debt, and he is called on to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him, for money paid, though the surety did not pay the debt by desire of the principal."—1st *Livermore on Agency*, 52-3; *Tousaint vs. Martinant*, 2d Term Rep. 104; *Exall vs. Partridge*, 8th Term Rep. 310; *Ponnall vs. Ferrand*, 13th Com. Law Rep. 230. In 2d *Kent's Com.* 617, the learned commentator asserts the principle, that "A surety, from his relation to the principal debtor, has an interest and a right to see that the debt be paid: and if he pays to relieve himself, it is money paid to and for the use of the other." If Bunn paid the money to Peck, as the *security* of Whitehead, as the record shows, he paid it *for Whitehead*; and if Whitehead had not reimbursed Bunn, he would have been entitled, so soon as the note became due, to have maintained an action against Whitehead, for so much money paid to Peck *for his use*. The charge of the court evidently proceeds on the ground, that Bunn, when he paid Peck, paid *his own debt*, when in fact he paid it for the *use of Whitehead*, *his principal*, and would have been entitled, as we have seen, (had it not been paid,) to recover it from Whitehead. If it was Bunn's own debt, he paid to Peck, money which he paid for *himself*, on what principle is it he would be entitled to recover it back from Whitehead? But certainly would not have been entitled to have recovered back his

money ; money paid *for himself* to Peck, from Whitehead ? The court below asserts as the law, that the security might pay off the whole debt, and recover of the principal, for so much money paid to his use. But if Bunn the security paid it *for himself*, how could he recover of Whitehead, for so much money paid *for his use* ? If Bunn paid the money to Peck for Whitehead as his security, as the record shows he did, then Whitehead is entitled to recover from Peck the amount of usury which Bunn paid him *for Whitehead*. The money which Peck received from Bunn, over and above the principal and lawful interest, was, in legal contemplation, Whitehead's money paid to Peck by Bunn for him, and which, in equity and good conscience, he ought to refund ; and the law raises an assumpsit in favor of Whitehead, and creates a *privity* of contract between Peck and Whitehead, which authorizes the plaintiff to recover in this form of action.—*Camp vs. Tompkins*, 9th Connecticut Rep. 553 ; *Mason vs. White*, 17th Mass. Rep. 560 ; *Hall vs. Marston*, 17th Mass. Rep. 575 ; *Wilson & Co. vs. Smith*, 3d Howard's Rep. 763. In *Camp vs. Tompkins* it is said, " In the eye of the law, there is always such *privity* of contract as is necessary to sustain this action, between a person who holds the money of another, which in equity and good conscience he is bound to refund, and the person whose money is thus withheld." In *Hall vs. Marston*, which was an action for money had and received, Chief Justice Parker says : " There are many cases, in which this action is supported without any *privity* between the parties, other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved, he has the money ; if he cannot show that he has legal or equitable ground for retaining it, *the law creates the privity and the promise*." If it be contended Bunn paid the money *voluntarily*, before the notes became due, without authority from Whitehead, it may be answered, Peck received the money *for Whitehead's notes*, and Whitehead, with a full knowledge of the facts, *ratified* the payment made by Bunn, and reimbursed him ; therefore, in judgment of law, the payment was made by Bunn as the *agent* of Whitehead, as clearly, as if Whitehead had in the first instance given Bunn the money to hand over to Peck, on the principle, that the ratification of the act of payment, by Whitehead, is equivalent to an original authority to Bunn, to make such payment. Besides, Whitehead having recognized and ratified the payment made by Bunn, Peck, with the money in his pocket, cannot be heard in denial of Bunn's agency, to make such payment for Whitehead. In my judgment, it would be iniquitous to permit him to do so, for the purpose of defeating this equitable action. If Bunn paid the money to Peck, the creditor, as the *security* of Whitehead, as the record shows he did, then he paid it *for Whitehead*, and Whitehead has reimbursed him. The defendant, Peck, then, has the money of Whitehead, which, under the laws of the country, he ought not to retain, paid to him either by Bunn as his *agent*, or paid to him for Whitehead by Bunn, *his security* ; and not being able to show, " he has either a legal or equitable ground for retaining it, *the law creates privity and the promise*" necessary, to entitle the plaintiff to recover. therefore of the opinion the judgment of the court below should be *ad*, and a new trial granted.

No. 22.—MOSES EASTMAN and SAMUEL PHILBRICK, plaintiffs in error vs. HENRY McALPIN, defendant in error.

The answer of a defendant is evidence for him, so far as it is responsive to the case made by the bill, or connected necessarily with the responsive matter, or *explanatory* of it. As where it is charged in the bill that the defendant in execution is *in possession* of the property conveyed by him to his co-defendant in the bill, as being *prima facie* evidence of fraud—the answer admitting the possession, and showing, by way of explanation, that the defendant in execution holds as tenant of the vendee, paying him rent and hire therefor, is responsive to the bill, and therefore evidence in his favor.

In the construction of a statute, when the words of the enacting clause are clear and positive, recourse must not be had to the title or the preamble. They serve to assist in removing ambiguities, where the intent is not plain and manifest. The title of an act and the preamble, are, strictly speaking, no parts of it.

A *bona fide* and *absolute conveyance* of any part, or the whole of his estate, by a person unable to pay his debts, (even to a creditor in satisfaction of a pre-existing debt, whereby another creditor is excluded from any share or portion of the estate so conveyed,) if the same be free from any trust for the benefit of the seller, or any person appointed by him, is a valid conveyance as against such excluded creditor, and all other persons. Such a conveyance is not obnoxious to the statute of 1818. (a)

This was a Bill in Equity, filed to set aside a conveyance of an insolvent debtor, under the act of 1818, and was tried before Judge Fleming, in Chatham Superior Court, January Term, 1846. The following are the facts of the case: Henry McAlpin, the defendant in error, under a contract for that purpose, furnished bricks to Samuel Philbrick, one of the plaintiffs in error, for the building of a dwelling-house and out-buildings on two lots in Brown Ward, city of Savannah. The bill for the bricks was partially paid, when Philbrick suspended payment, generally. After his suspension, he paid about six hundred dollars on the account for bricks, leaving a balance then due of some two thousand dollars, or up-

(a) "An Act to prevent assignments, or transfers of property, to a portion of creditors, to the exclusion and injury of the other creditors, of persons who fail in trade, or who are indebted at the time of such assignment or transfer." Assented to Dec. 19, 1818.

"Whereas a practice of selecting particular creditors by assignments and transfers of property, made by persons indebted, and thereby excluding or defrauding other *bona fide* creditors of their just claims, on the estate of insolvent debtors, is contrary to the first principles of equity and justice; to prevent the mischief thereof,

"Be it enacted, &c., That any person or persons, unable to pay his, her, or their debts, who shall at any time hereafter make any assignment or transfer of real or personal property, stock in trade, debts, dues, or demands, in trust, to any person or persons, in satisfaction or payment of any debt or demand, or in part thereof, for the use and benefit of his, her, or their creditor or creditors, or for the use and benefit of any other person or persons, by which any creditor of the said debtor shall or may be excluded from an equal share or portion of the estate so assigned or transferred, such assignment, transfer, deed, or conveyance, shall be null and void, and considered in law and equity as fraudulent against creditors:—Provided, nevertheless, that nothing contained in this act, shall prevent any persons in debt, from *bona fide* and absolutely selling and disposing of any part, or the whole of his, her, or their estate, so the same be free from any trust for the benefit of the seller, or any person or persons appointed by him, her, or them."

wards. McAlpin brought his action for the balance against Philbrick, and recovered a judgment. Previously to the recovery of this judgment, Philbrick being indebted to the minor children of J. Stone, deceased, of whom Eastman, the other plaintiff in error, was guardian, on a note endorsed by J. W. Morrell, of Savannah, and being also indebted to the estate of Wesley Abbott, who had been for many years a workman in the jewelry store of Eastman, and in the welfare of whose family Eastman felt an interest, was pressed by Eastman for a settlement of those debts. Under the pressure, as the only means of meeting the demands, Philbrick resolved to sell the said property in Brown Ward, a house and lot in Hicks Tything, Savannah, three slaves, his house servants, and his furniture, and to remove his family to the North to reside, until he was relieved from his difficulties.

He, accordingly, proposed to Eastman to become the purchaser of the whole property, in which event, after paying certain mortgages upon the property in Brown Ward and Hicks Tything, he would allow as much of the purchase-money as was necessary to satisfy the aforesaid debts to Stone's children and Abbott's estate to be so applied. The purchase was made, at an adequate price. Eastman assumed the payment of the mortgages, which he took up, and advanced the balance of the purchase-money in cash, and took up and delivered to Philbrick the notes of J. Stone's children and Abbott's estate, and paid him the surplus in cash.

Eastman subsequently sold the Hicks Tything property, at an advance of \$500 on the original purchase by him. He went on to complete the building in Brown Ward, which, at the time of the sale, was in an unfinished condition; and after expending upon it about \$3,000, had some of the rooms sufficiently finished to be occupied.

The sale took place in April, and in July following Philbrick stopped payment. *The conveyances were absolute, and the purchase-money proved to have been paid.* The bill alleged that Philbrick remained in the possession of the slaves and furniture after the sale, and exercised ownership over them and it, and subsequently, and as soon as the said dwelling-house and appurtenances in Brown Ward were completed, proceeded to occupy the same, and still continued to do so. The possession being so alleged, the questions were asked in the interrogatory part of the bill, "In whose possession the said estate, real and personal, then was?" and, "What had become of said slaves and furniture?" To which the said Eastman answered, admitting the possession of Philbrick, and stated, by way of explanation thereof, that Philbrick, having changed his mind as to sending his family to the North to live, hired the furniture and two of the slaves, he (Eastman) having sold the other; and in December of the same year he rented the house in Brown Ward, at \$300 per annum, for one year, which renting and hiring to Philbrick had been continued. The answers of both the said Eastman and Philbrick, positively denied all *trust* of any kind, and averred that the said sale was absolute and *bona fide*. And no *trust* was proved.

The cause proceeded to trial in the court below; and the evidence having closed, the Circuit Judge charged the jury that possession of the vendor, at the sale, was *prima facie* evidence of fraud, and, unless explained, was conclusive; and that the explanation of that possession contained in the answers was no evidence, because not responsive to the allegations

or interrogatories in the bill. Whereupon the solicitors for the plaintiffs in error, who were the defendants in the bill, excepted to the said charge, because the answers in that regard were directly responsive, both to the allegations and interrogatories in the bill; and because the transaction being an absolute sale for a valuable consideration, as proved by the evidence in the case, the purchaser had a right to do with the property as he pleased; to place whomsoever he would in possession; and that, under those circumstances, no inference of fraud or trust ought to have been left to the jury, as deducible from the vendor's possession, in this case.

And the court below further instructed the jury that the terms *bona fide* in the said act of 1818 didn't only mean an absolute sale for a valuable cash consideration paid at the time, but superadded the idea, that any condition or agreement in the original contract of sale from an insolvent man that the purchase-money should be applied to the payment of certain creditors, whereby others became excluded, the money having in fact been so applied, would not be *bona fide* within the meaning of the act of 1818. To which the solicitors for the plaintiffs in error excepted.

The solicitors for the plaintiffs in error then requested the court to instruct the jury that the deed being absolute, if there was no evidence of a secret trust, the case was not within the statute of 1818, which instruction the court refused to give; but, on the contrary, charged the jury that the deed, although absolute, and for a cash consideration paid at the time, was within the statute, if the property was purchased under a condition and agreement entering into the original contract of sale between Philbrick and Eastman that the purchase-money should be applied to the payment of certain creditors whereby others became excluded, Philbrick being insolvent at the time. Also, that if the consideration-money, or any part thereof, was applied under such contract to the payment of a pre-existing debt, the case was within the statute. To which the plaintiffs' solicitor excepted.

The solicitors for the plaintiffs in error asked the court, further, to instruct the jury that the plaintiff in error, Eastman, having purchased for a cash consideration, paid by him at the time, the consent of Philbrick that the cash purchase-money should be applied to the payment of the debts of Philbrick to the minor children of J. Stone, of whom Eastman was the guardian, and to Abbott's estate, and the actual application of the purchase-money to those objects, did not bring the case within the act of 1818: which instructions the court refused to give; but, on the contrary, charged that the condition and agreement in the original contract of sale between Philbrick and Eastman that the purchase-money should be applied to the payment of the said debts, Philbrick being insolvent, created a trust for the payment of said creditors of Philbrick, to the exclusion of other creditors, which brought the case within the act of 1818. To which the plaintiffs' solicitors excepted.

The solicitors for the plaintiffs in error then asked the court below to instruct the jury that whilst it might be true that if Philbrick had assigned the property to Eastman to pay the debts out of what the same might realize, it might have been within the act, yet that Eastman having made an absolute purchase, for cash advanced, the direction of Philbrick to apply that cash, when paid, in a particular way, even to the payment of particular debts, did not bring the case within the act of 1818: which instruction

the court refused to give; but, on the contrary, charged the jury that the instruction asked was substantially answered in the charge given on the previous instructions prayed. Whereupon the solicitors for the plaintiffs in error excepted.

The jury, under the charge and decision of the presiding judge, rendered a verdict setting aside said conveyances, and decreeing the said property to be subject to the debts of Philbrick, &c.

Upon all which exceptions to the decisions of the court below the plaintiffs assigned error.

WM. LAW for the plaintiffs in error.

The plaintiffs in error will maintain, that the court erred in charging the jury, that the explanation in the answers as to the possession by Philbrick after the sale, was not responsive to the bill and not evidence in the cause.

They contend that such passages of an answer as are explanatory of other passages responsive to the bill must be read.—5 *Ham. Rep.* 284, 285; 1 *Russ. and Mylne*, 64; 5 *Sim.* 225; 3 *Russ.* 149; 3 *Phillips on Ev. by Cov. Notes*, 927.

Affirmative facts in the answer responsive to the bill, either to the charging, stating, or interrogatory part, are conclusive as testimony, unless repelled by proof.—2 *John. Ch. Rep.* 85; 1 *Coven's Rep.* 744, by *Woodworth, J.* 711, 742; 1 *Paige* 239; 3 *Wend.* 643; 5 *John. Ch. Rep.* 534, 542, 543; 2 *McCord's Ch. Rep.* 90, 101, 102, 344, 350; *Cooper's Ch. Cas.* 161; 4 *Paige*, 368.

2d. They maintain further, that the court erred, because possession in the vendor, after sale, is no evidence of fraud in the sale of real estate, to the same extent as in the case of personal property.—*Newland on Con.* 371 *et Seq.*; *Roberts on Fraud, Con.* 549, 550.

3d. They maintain also, that the court erred, because an adequate cash consideration having been proved to have been paid, and the transaction a *bona fide* sale, possession was no evidence of fraud. The *bona fide* purchaser, who had paid his money, had taken absolute conveyance, could place whom he pleased in possession, without invalidating his title.

4th. They will maintain, that in a case, in which a full, fair and adequate consideration was paid in cash, or its equivalent, the conveyance absolute on its face, and no secret trust proved, the sale is *bona fide* within the meaning of those terms in the act of 1818, notwithstanding the purchase-money, was applied to the payment of antecedent debts, under an agreement, as the condition of the purchase, that it should be so applied; because the statute embraces only tangible property, and not money. Under the statute, an insolvent may pay his debts with his money; and such money cannot be followed.—*See Ch. Harper's Decision in Schultz's case—pamph. p. 45.*

A valuable consideration implies the *bona fides* of the transaction, unless it is shown to be merely colorable.—*New. on Con.* 381; 5 *Tm. Rep.* 238; 4 *East.* 1.

As the whole case turns upon the act of 1818, the construction of that act becomes the prominent inquiry of the cause.

The plaintiffs in error maintain, that the existing evils intended to be remedied by the act, ought to be carefully weighed in its construction. The old law, and the construction of the statutes *in pari materia* are to be considered.—3 *Dall.* 233, 253, 267; 4 *East.* 433; 1 *Kent's Com.* 460, *et seq.*

The evil to be remedied was the practice, by insolvents, on the eve of winding up, of making assignments in trust, giving a preference and securing an advantage to the debtor.

1st. At common law an insolvent might prefer any creditor; he might make an assignment, to secure an antecedent debt, of a part or the whole of his property; so there was no fraud or color, and he might do this the very night he absconded.—11 *Wheat.* 98; 7 *Peters*, 614

2d. He might do the same thing under 13 Eliz.: if there was no fraud proved. Because *bona fide* and upon *good consideration*. That was all the statute required.—*New. on Con.* 381, 382.

3d. Under the bankrupt acts, he might secure a particular creditor, unless by deed, in contemplation of bankruptcy, or it was of *all* his effects. In either of these the law made it an act of bankruptcy.—*New.* 381, 2; *Doug.* 92; 7 *Peters*, 614.

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Aided by the light derived from this inquiry, we proceed to consider the construction of our own act; what is prohibited by the enacting clause of the act of 1818? An assignment *in trust* giving a preference. What is saved by the proviso? An absolute conveyance. May an absolute conveyance be embraced? Yes, when it is not *bona fide*; when it is merely colorable; when the facts and circumstances show a secret trust. Is the payment of an antecedent debt such a consideration as will constitute the transaction *bona fide*?

Yes, if it is absolute, and nothing reserved to the vendor, and free from any trust. The reason is, because the statute is silent on that subject. It does not prescribe whether the consideration shall be a present advance, or the payment of a debt. It contents itself with the exclusion of all trust.

The plaintiffs in error will maintain that in the absence of evidence of a secret trust, this transaction is *bona fide* within the statute; and that as the sale was not voluntary on the part of Philbrick, was not made with the view to defeat creditors, nor in the immediate contemplation of insolvency; but was extorted and wrung from him by the pressure of Eastman, the case is not within the statute.—*Doug.* 6S, 92; 1 *Wash. Cir. Ct. Rep.* 34, 35; 1 *Amer. Jur.* 9, 197.

They further maintain that as no trust attached upon the property sold, nor was the consideration an antecedent debt, the purchaser having paid his money, the application of the money in part to the payment of pre-existing debts cannot create a trust within the meaning of the act. As the vendor could apply the money, when paid to him, without restraint by the statute, it could not violate the statute that the purchaser should stipulate as the condition of his purchase, for such a disposition of the money, as it was lawful for the vendor to make, had the money been placed in his hands.

The plaintiffs in error will also maintain that the decree is unjust and inequitable upon the grounds specified in the last exception.

R. M. CHARLTON, for defendant in error, in reply to the opening argument of counsel for the plaintiffs in error.

1st Exception.—This exception is based upon the charge of the court, that possession of the vander after the sale, was *prima facie* evidence of fraud, and unless explained became conclusive; and that the explanation of that possession stated in the answers was not evidence, because not responsive to the allegations of the bill.

The court below was right on both these points, as we will proceed to show.

The doctrine, that the possession of the vendor after the sale, is evidence of fraud, unless such possession be consistent with the deed, is now so well established, that it admits of no doubt. The only difficulty on the point is, is it conclusive, or is it only *prima facie* evidence of fraud?—See *Twyne's case*, 3 *Coke*, 80; also reported in 43 *Law Library*, p. 1, and cases cited in the *English and American notes*.

Many of the cases hold the presumption to be incapable of being rebutted by any proof, and hold it to be conclusive, especially when the consideration, or a part of it, was an antecedent debt, as we will show this to be.—*Smith vs. Henry*, 1 *Hills*, S. C. Rep. 16; *Edwards vs. Harben*, 2 *Term. Rep.* 587; and also cases cited in *English notes to Twyne's case*, 43 *Law Library*, p. 36.

In *Virginia*, such possession is, *per se*, fraudulent, however free in other respects the case may be from any evidence of dishonesty or unfairness.—See 43 *Law Library*, p. 43.

And so far is the principle there carried, that an immediate re-hiring, *bona fide*, renders the sale fraudulent in law, as was held in *Lewis vs. Adams et al.*, 6 *Leigh*, 320; see p. 45 of 43 *Law Library*. (And this proceeds upon the principle, that this subterfuge of re-hiring would be so often resorted to, that if allowed to prevail, it would defeat the whole object of the law.)

And the *Kentucky* authorities are to the same strong purport. The possession is conclusive evidence of fraud, not merely *prima facie*. A re-delivery on loan, or for hire, does not help it.—See 43 *Law Library*, p. 46; see, particularly, *Laughton vs. Ferguson et al.*, 6 *Dana*, 111.

In *Illinois*, the possession inconsistent with the deed, is a fraud in law.—43 *Law Lib.* 47.

So in *Indiana*, no evidence can be admitted to explain a possession, which is inconsistent with the contract.—43 *Law Library*, 47.

And in *New Hampshire*, though the distinctions taken are somewhat refined, it has been decided, that an agreement subsequent to the sale, that the vendor should retain possession and pay rent, was no sufficient explanation of possession, for it did not disprove (indeed, under circumstances like the present, it may be said to prove) a secret trust.—*Coburn vs. Pickering*, 3 *New Hampshire*, 415.

In *Pennsylvania*, the rule is carried to its utmost extent.—*Clow and another vs. Woods*, 5 *Sergeant & Rawle*, 275; 43 *Law Library*, 52.

And the vendee's possession must continue; it must not go back to the vendor.—43 *Law Library*, 53.

In *Vermont*, the principle is carried to the extent, that "no matter how honest the conveyance may be in point of fact, the law pronounces it fraudulent per se, and void."—43 *Law Library*, p. 55. And the possession of vendee must be continuing; it must not go back to vendor.

And though, in *Alabama*, the subject is involved in perplexity, and the decisions are contradictory; yet even there, though the consideration were ample, and bona fide paid, and the bill of sale recorded, and notice given to the world, these would not be sufficient explanations of the possession.—And see *Hamilton vs. Russel*, 1 *Cranch*, 309, 316, 318.

All the cases proceed upon the presumption, that there was a trust, express or tacit, for the use of the vendor, evidenced by the continued possession.—*Smith vs. Henry*, 1 *Hill's S. C. Rep.* 16; 43 *Law Library*, pp. 30, 44.

The fact that a price was paid for the property by the vendee, does not vary the principle, except in degree it changes the presumption, according to the *Carolina* doctrine, and some other cases, from conclusive to *prima facie* evidence of fraud; but the presumption remains there, and will continue to remain, until rebutted by actual proof.

The court below committed no error on this point. It leaned as strongly to the plaintiffs in error as it could, in charging the jury, that the continued possession was only *prima facie* evidence of fraud. And though the principle is oftener invoked in reference to personal property, yet there is no reason in law why it should be so limited. The statute of 13 *Elizabeth*, c. 5, upon which all these cases proceed, speaks as well of "fraudulent feoffments," &c., "as well of lands and tenements as of goods and chattels," and declares them to be void. There is not the slightest distinction between lands and goods in this regard, and not the slightest reason why there should be, especially in the State of Georgia, which has by its legislation virtually broken down many of the English distinctions between the two.—*Schley's Dig.* p. 214-15, sec. 1 and 2. And the decisions on this point expressly embrace lands.—*Hildreth vs. Sands*, 2 *John. C. Rep.* 46; *Bates vs. Gratts*, 2 *Ves. Jr.* 293.

But it is said—and that forms another branch of this exception—that the answers of the defendants below furnished sufficient evidence to rebut this *prima facie* presumption, and that the Judge repudiated the evidence, (as it is called,) because he said that it was not responsive to the allegations or interrogatories of this bill.

There can be no doubt, we apprehend, that no part of an answer is admissible for the person making it, except when it responds to the bill. What he says in avoidance, he must prove, or it goes for nothing.—*Hart vs. Ten Eyck*, 2 *John. C. Rep.* 88, et seq.

An examination of the bill and answers will show that the defendants were not interrogated except as to the fact of possession (which they would not have dared to deny); but as to the agreement under which the vendor so retained possession no question is asked. See the bill.

(The defendants are asked to state the agreement concerning the purchases; but they are not asked to state the agreement as to the retention of the possession but only as to the fact of possession.)

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And besides, we have already seen that the great weight of authority is against the opinion that the fact of a re-hiring relieves the case from the legal inference of fraud, even though it be *bona fide*. Indeed, it is we that ought to complain upon this point. The court, upon very respectable authority, might have told the jury that the possession of the vendor was conclusive evidence, legal evidence of fraud; admitting of no explanation, either by the answers of defendants, though responsive to the allegations and inquiries of the bill, or by any other testimony. And the jury would have been authorized, under the facts of the case as set forth in the answers of the defendants below, to have come to the conclusion that even if the possession of vendor was only *prima facie* evidence of fraud, that, despite the answers, it was not rebutted.

Looking to the inadequacy of compensation of the land—the value of three negroes—the fact that Philbrick, the alleged vendor, remained under the shelter of the same roof, eat off the same table, and was waited on by the same servants—the meagre sum that he paid his alleged vendee for the rent of a building that cost him \$8,000—the inadequate hire of the negroes—the fact that Philbrick allowed him all the benefit of the cheap purchase of the lot in railroad bonds—and this additional fact that it is admitted in the answers that all this benefit to Philbrick was by compact and agreement—all goes to show that Philbrick, in making this sale to Eastman, did gain a positive benefit, the benefit of keeping the same house at a very cheap rate, and of retaining at a very moderate hire, the same negroes and the same furniture, and that these were benefits that would not have been obtained by him, if a sale had been made to any other; and when we remember that this was confessedly the last plank of Philbrick's property, and that Eastman was saving it for himself and his friends, at the expense of all the other creditors of Philbrick, we must be blind if we do not see that if it was not expressly agreed, it was at least *tacitly* implied, that such indulgence and benefit would be granted to him.—See *Smith vs. Henry*, 1 *Hill's S. C. Rep.* 23.

The 2d, 3d, 4th and 5th exceptions bring us to the consideration of what is called for brevity the "Act of 1818," and which is found in *Prin. Dig.*, p. 164.

Let us read that act carefully, and analyze it;—

And first, let us ask for what purpose this act was passed—what was the old law—what the mischief it allowed—and what was the remedy? I believe that this is a cardinal rule in the construction of all remedial statutes.—1 *Black. Com.* top page, 59.

1st. What was the old law—how stood the common law at the making of this act? It allowed preferences to be given by an insolvent man to any creditor he pleased, in total exclusion of other creditors, however meritorious.

2d. What was the mischief? It was, that a man, who had become insolvent and reckless, selected out as his beneficiaries his relations and his friends, by an arbitrary proceeding, withholding frequently, at his own pleasure, from the poor and honest laborer, his slender pittance, which he had earned fairly, and which he was richly entitled to, but which was refused to him by his debtor, because such debtor chose, with the sanction of the law, to pay others whom he liked better, but who were not a bit more meritorious. But the injustice of such a proceeding frequently struck courts of justice, especially courts of equity, whose golden rule is, that "equity is equality," and though the courts could not legislate, yet, as we have seen in the case of *Smith and Henry*, and as we will see in the case of *Goodrich vs. Downs*, in 6 *Hill's Rep.*, 439, 440, they strove to confine the unjust rule.

3d. And what was the remedy provided? The good sense of the Georgia Legislature, recognizing the rule that equality is equity, and that a man who was unable to pay his debts, held his remaining property virtually as a trustee for his creditors, proceeded to declare that this practice of selecting particular creditors was contrary to the first principles of equity and justice, and passed the act of 1818 to prevent such selection in future in the State of Georgia.

Now the first idea that we have to combat is, that *absolute* deeds, containing no trust upon their face, are not within the spirit or intent or letter of this law.

We must remember, before we take up this objection, that "it is the business of judges so to construe this act, as to suppress the mischief and advance the remedy."—1 *Blackstone's Com.* 59.

The argument used by our adversary, if we correctly understand it, is, that the deed must be "in trust;" that is, it must appear upon its face that there is a trust.

But what do the words "in trust" mean? They mean that if the property is conveyed to a person for the benefit of particular creditors; or, if the effect of the deed or transfer is to prevent an equal distribution of all the effects among the creditors of the insolvent, and to secure it to a few, that that is the trust for the benefit of the particular creditors, and therefore the deed is void.

Surely the legislators were not so stupid, and the law is not so impotent, that while they and it condemn the selection of particular creditors in the most unmeasured terms, while they and it declare it to be contrary to the "first principles of equity and justice;" and while the act was passed expressly "to prevent the mischief thereof," yet, if a party wishes to avoid the law, and to do the very thing it condemns, all that he has to do is to leave out the words "in trust" to make an absolute deed, and have the trust secret or apart from the deed, and he and his favored crew may smile at the law in triumph.

It would be curious enough if this could be so, but it is not so; and the decisions both of Georgia and South Carolina on this very statute, expressly repudiate such an idea; and they hold the clear and correct doctrine, that if the agreement dehors the deed, or the effect of the deed, whatever its words may be, gives one creditor the preference over another of an insolvent man, the deed is void under the provisions of this act of 1818.—*Cumming vs. Fryer*, *Dudley's Geo. Rep.* 182; *Railroad Co. vs. Claghorn et al.*, *Spears' Equity Reports*, 552, especially 553; *Bank of Georgia vs. Schultz*, *ibid.* 556; *Chancellor Kent's MS. Opinion*.

And it is impossible to look at the facts of this case, and say that the effect of the agreement has not been to prefer particular creditors. Have not Eastman and Abbott received payment in full? Have not McAlpin and other creditors received nothing?

But then we have to encounter another objection. It is said there were no trusts here, secret or otherwise; that the answers repudiate, expressly, such an idea. So they do, in words, and so they do the fact of insolvency; a fact that was established with such a power and force of testimony, as to be absolutely overwhelming. But when we look a little closer to the facts sworn to, the trusts develop themselves.

But first, I call your attention to the fact, that the continued possession of the vendor, unexplained, does of itself raise the presumption of a secret trust for him, which is unrepelled, as we have shown; and the same presumption that would make the deed void, under the statute of Elizabeth, would, with redoubled force apply to this statute, and make the deed void under it—there is a secret trust, and the law declares it for the vendor here.

And this is a trust in the property itself.

But again, there were actual trusts. It is not necessary that the trust should be in the estate sold. The trust may be in the proceeds of the sale. If a trust is created by the contract of sale, that will bring it within the act of 1818. Who is a trustee?—2 *Story's Equity*, p. 374, sec. 1041, p. 379, sec. 1045, p. 544, sec. 1196.

Now let us apply this law. We say that there were several trusts here, and that Eastman, the vendee, was trustee.

1st. That out of the proceeds of purchase-money, he would pay off and deliver a note, so that Isaac W. Morrell, the accommodation endorser of S. Philbrick, the vendor, should be relieved.

2d. There was an express trust (it was part of the contract) for the benefit of Mrs. Abbott, a creditor of Philbrick; the very foundation of the contract between Philbrick and Eastman was, that the debt of Mrs. Abbott against Philbrick should be paid out of the purchase-money.

3d. There was an express trust for the children of J. Stone, or for Eastman, the

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vendee himself, (and I care not which it was,) for it was also agreed that this debt, due by Philbrick, should be paid out of the purchase-money.

And here we may ask, to whom was this debt due by Philbrick, upon the loan of the money of J. Stone's children? Who was the legal owner thereof? Either Eastman or the said children.

Eastman was the guardian. He says, in his answer, that "he loaned" Philbrick the money. It was due to him as guardian, to be sure, but still it was due to *him*. He was responsible to his wards, because the law required him to loan their money out only upon landed security. They had the equitable right, and he the legal.

But suppose this be not so, and that this was legally due to J. Stone's children; then Eastman was, by the agreement of purchase, made a trustee for them, to pay their favored debt, in exclusion of other creditors of Philbrick.

It seems to be perfectly immaterial to whom this debt was legally due. One thing is very certain, that it was a debt legally due by Philbrick; that it was an antecedent debt; that he was insolvent at the time of this agreement and conveyance; that by the very agreement itself, and certainly by its effect, this debt was paid in full, and other of his creditors were wholly excluded. And whether the agreement went to discharge a debt in full to Eastman himself, as one of the favored creditors, or went to relieve Eastman from his responsibility to his wards, on account of this note, or to relieve Morrell, the accommodation endorser of Philbrick, therefrom, or to pay the children of J. Stone this debt due to them, its extent, its object, and its effect, were to exclude certain creditors of an insolvent man, and to pay others, chosen by him, in full. And if this can be sanctioned by a court of law, despite the statute, then is the statute a mockery and a delusion—a legal trap to catch the consciences of failing men and greedy creditors!

An antecedent debt may be a good consideration in States which allow preferences, because the debt is the same as the money. It is not contrary to the policy; but in Georgia, under the act of 1818, the policy is different; preferences are forbidden. Any act done "by which" such preferences are given, are declared to be fraudulent. Receiving an antecedent debt as payment would be defeating the policy of the act of 1818.

But then, it is said, that this very act of 1818, provides that any person in debt, may *bona fide* and absolutely sell any part, or the whole, of his estate, so that the same be free from any trust for the benefit of the seller, or any person appointed by him.

Well, but what do the words *bona fide* mean? A transaction or sale made in conformity with, and not opposed to any law of force in the State.

This very act has just said, that a sale or transfer, by which any creditor of an insolvent man is excluded from his just debts, is contrary to the first principles of equity and justice, and therefore *not in good faith*.

It surely cannot mean, by these words, *bona fide*, to exempt a transfer or agreement made in the very teeth of this declaration, or to include a transfer whose intent and effect were to exclude certain creditors of an insolvent man, and to prefer certain other creditors, which it declares to be contrary to the first principles of equity and justice!

Though it may be a mark of good faith that money has been paid, yet all the money in the world will not constitute an act, done against any law, as an act done *bona fide*.

And besides, the statute says, that the sale spoken of in the proviso, must not only be done *bona fide*, but that the same must be free from any trust for the benefit of the seller, or any person or persons appointed by him. And that brings us back exactly where we started: for we allege, that the continued possession of vendor raises the legal presumption of a trust for him; and that there were trusts for the benefit of persons appointed by him, viz., Eastman, Morrell, Abbott, and J. Stone's children. And we have tried to show, and think we have shown, both by reason and authority, that whether these trusts are on the face of the deed of transfer, or are shown to exist by other proof; whether the deed be absolute or not, if its eff

be to create these benefits and illegal trusts, or if, to use the language of the statute, if the deed of transfer be one "by which any creditor is excluded," it is void.

But it is said Eastman purchased for a cash consideration, and that therefore any agreement as to the application of the money could not invalidate these transfers under the act of 1818.

Now, I admit, that though a man be insolvent, yet, that notwithstanding the statute of 1818, if there be no liens on his property, he may sell for cash or its equivalent (by which word I mean to exclude an antecedent debt) to any one; so that there be no illegal agreement between the parties, so that there be no trust secret or otherwise, to bring it within the mischief and the remedy of the act of 1818: and this is the true meaning of the proviso in that statute which we have just been considering; and I admit, that if an insolvent man, without any pre-contract to that effect, or any agreement contrary to the spirit of the act of 1818, but after the sale shall have been *bona fide* made, and without any kind of trust, secret or otherwise, for the vendor or any other person, should direct the vendee to apply certain portions of that purchase-money to third persons, that so far as the purchaser was concerned, that this would be the same thing as if paid to vendor himself.

But this is the distinction that I draw, and it must be very obvious—and this is the distinction that the court below acted upon—viz: the act of 1818 allows even an insolvent man to sell his property, and receive the cash; because the law presumes always that men will obey the law, and it cannot presume that they will violate it; and therefore, it presumes that the cash derived from this absolute and *bona fide* sale will be distributed ratably as the law directs. But can this presumption arise, when, by the very contract of sale, it is expressly agreed that the purchase-money, or the larger portion of it, shall not be distributed ratably, but shall be applied to a few of the creditors, in exclusion of the others.—*Chancellor Kent's MS. Opinion.*

Eastman purchased, and Philbrick sold under an express agreement, the very inducement of the sale, that the purchase-money should not be paid to Philbrick, but should go to the payment of certain creditors in full, leaving the other creditors without a dollar.

Will the law allow two men to agree to produce an effect which it declares to be contrary to the first principles of equity and justice, and then allow the illegal act to stand, and the unjust bargain to be consummated under its very eyes, and with its aid and sanction?

The distinction then is between a purchaser paying the purchase-money as his vendor directs, and without a previous agreement, and understanding to do what is contrary to law, and a purchaser agreeing with a vendor to buy, *provided* the purchase-money should be applied to a purpose and in a way that the law prohibited. The Court would protect the first purchaser; but it would declare the act of the purchaser, secondly above named, as void, and leave him to reap the consequences of his illegal combination and confederacy.

Even if he had paid a full consideration, if he had paid it under an agreement contrary to law, under an agreement to do that which the law calls fraudulent, he stands in no fairer aspect in the eye of the courts than if he had not paid anything.—*Lowry vs. Pinson*, 2 Bailey, 324; *Thomas et al. vs. Jeter et al.*, 1 Hill, S. C. Rep. 380; *Ayres vs. Moore*, 2 Stewart Alabama Rep. 336—cited in 43 Law Library, notes to *Twyne's case*, p. 58.

It may be said that this was not a voluntary conveyance—that Eastman was pressing.

1st. The first answer is, that Eastman did not press for these illegal conveyances; he only pressed for the payment of these debts. The offer of the sale of this property for these purposes came from Philbrick; Eastman only accepted these offers.

2d. Eastman, say the counsel opposed to us, was not a creditor of Philbrick; insist that the debt he represented as guardian of J. Stone's children, was due to and not to him. We believe it has never been decided, even under the

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bankrupt laws of England, that if a third person, not a creditor, urges the debtor to pay a creditor, that *that* will exclude the preference from the operation of the law, or that it will cease to be voluntary.

3d. But is there any proviso in the act that, if the creditor asks or entreats, or even threatens the debtor, that because of that entreaty or threat, the debtor may perform an act that the statute declares to be contrary to the first principles of equity and justice? No power could have made the debtor execute the conveyance contrary to the law. Shall the entreaty or the threat legalize that which the law declares to be fraudulent and void? Shall the skillful, cunning, bold, unscrupulous creditor, because he asks or threatens a man to do that which the law forbids, be sustained and upheld by the law, and by its courts, because he has thus coaxed or threatened a violation of the statute? Or is not the meaning of the maxim, that the law was made for those who are vigilant and not for those who sleep, limited to those who by fair and legal methods obtain a priority, as by judgment and the like?

What have we to do with the bankrupt system of England? A man may be bankrupt there, though he has millions of pounds sterling above his indebtedness.

Ours is no bankrupt system, but it is an act passed to prevent an insolvent man from preferring one creditor to another.

The decision in 1 *Wash. C. C. Rep.* 34, says that the giving the preference would not constitute a bankruptcy, but that it would be a fraud upon the general creditors; that is what our statute says, and that is what we ask. We do not wish to declare Philbrick bankrupt under the English law.

When the court comes to examine this case, for the purpose of deciding it, let it ask—

1st. Was not Samuel Philbrick a person unable to pay his debts? Was he not utterly insolvent at the time of these transfers? This is conceded.

2d. Did he not make a transfer or assignment of all his estate?

3d. Were not the conveyances made to a person, or to persons, in satisfaction or payment of debts and demands, by which other creditors of the said debtor were excluded from an equal share of the property so assigned? Was not the effect of this agreement, and the transfer made in pursuance of it, to pay certain creditors of Philbrick, and to prevent McAlpin and other creditors from getting a cent?

It is impossible not to answer these questions in the affirmative, and it is perfectly clear, that both the spirit and letter of the act declare, that deeds made under such circumstances are void.

The last objection is, that the decree has not rendered justice to Eastman, even supposing these deeds to be void; because, having paid certain of Philbrick's debts, and having canceled and given up the evidences of these debts to Philbrick, he is equitably entitled to have his money refunded; and, at least, he is equitably entitled to be placed in the stead of these creditors, and to come in equally with the general creditors.

And the answer we make to this, is,

1st. No such instruction was asked of the court; no such argument was made to the jury; there was no error, therefore, with the court or jury; and this court has no cognizance of it.

2d. The argument is not founded in law. Give it its full effect, and it would amount to this: If a man combines with another, to effect an illegal act, and advances money for the purpose, if he is caught at it by the law, the contract is made void; but then, the money he paid is paid back to him by the law; so that if he succeeds in evading the law, he secures the fruits of his illegal act; but if he does not succeed, he loses nothing, since the law pays him back what he has paid, and he loses nothing.

This would be holding up an inducement to commit fraud, instead of hanging up a terror to prevent it.

Money paid upon an illegal contract, can never be recovered back; and East-

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man could not recover from Philbrick this money, much less from the famished creditors of Philbrick.

He has received everything he is entitled to.

He agreed to give for the buildings,	\$8,500 00
Negroes,	800 00
Furniture,	903 00
	\$10,203 00

He paid this, as follows :

To the note due to J. Stone's children,	\$4,621 00
Abbott's estate,	1,480 19
Mortgage to Rogers, on Hicks Tything,	1,070 01
Do. to Rogers, on Brown Ward,	2,675 01
Cash to Philbrick,	356 79
	10,203 00

He sold Hicks Tything for	\$3,000
one negro for	500
the furniture, valued at	903
	\$4,403

The decree allowed him to retain this sum of \$4,403, to recompense him for the legal mortgages paid to Rogers, amounting to \$3,745 02

Cash paid to Philbrick, 356 79

\$4,101 81

and besides this, the decree allowed him to have a lien for \$3,000, on the lot and buildings in Brown Ward, to pay him for the repairs made on said buildings since his purchase.

This was allowing him more than the law allowed him; for the settled doctrine of the law is, that if a deed be made void by a statute, if it is void as to part, it is void as to whole.—1 *Saunders's Rep.* 66, A—Note 1; *Crossley vs. Arkwright*, 2 D. and E. 603; *Dunn vs. Dolman*, 5 D. and E. 641; *Rock vs. Thayer*, 13 Wendell 53; *Loomis vs. Newhall*, 15 Pickering, 167; 1 *Brock. Rep.* 184; *Crawford vs. Morrel*, 8 John. Rep. 198; *Goodrich vs. Downs*, 6 Hill's N. Y. Rep. 441; *Judge Johnson's Decision in Schultz vs. Bank of Georgia, MS.*

The jury dealt very liberally with him, therefore, in making him these allowances, which by law he was not entitled to.

3d. And our third answer is, that the decree has done him no injustice as to these debts he paid; nor, if he be a creditor, has it precluded him from claiming under it. It merely declares, that after the liens of the judgments are paid, all the creditors of Philbrick shall come in equally. If Eastman be a creditor, a point which the decree does not touch, he can come in under it, and take his equitable share.

WM. LAW, in conclusion, for the plaintiffs in error.

1st. We say that the answers in regard to the possession remaining in the vendor, were responsive to the bill. The bill charges that the vendor continued in possession, and calls for an answer. It is answered by stating how that possession was continued.—See 1 *Cowen*, 742-4. The whole sentence must be taken together. Passages explanatory of what is responsive, must be read.—3 *Phil. Cow.* 927, and cases. Affirmative facts in answer, responsive to the bill, are conclusive, unless repelled.—2 *Phil. Cow.* and cases.

2d. Possession in vendor of land has not the same effect as chattels.—*Newm.* 371, et seq.; *Robt. on Fraud, Con.* 549, 550-2-3.

3d. Possession no presumptive proof against positive testimony of actual pay-

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ment of cash consideration, establishing the *bona fides* of the transaction. It is a presumption of fraud, where anything is left to presumption, but cannot operate against opposing positive testimony.

4th. We say there was no trust of any kind which attached upon the property sold. What is a trust?—See 2 *Story's Eq.* 230. Apply this definition to the case.

If there was any trust, it attached upon the purchase-money. But money is not embraced by the act. It is tangible property only—*Ch. Harper's decision*, page 5. Under the act, the debtor may apply his money to the payment of his debts as he may prefer.

5th. My next proposition is, that by the proviso of the statute, an absolute sale for cash is saved.

6th. The purchase being made upon the condition that the money should be applied to the payment of certain debts, is not vitiated thereby.—See 5 *T. R.* 238; 4 *East*; 1 *New.* 381-2. Upon this point, there is no reason to vary the construction upon our statute from the English. In the case in *Cowp.* it was the iniquitous intent to defeat a creditor. No such purpose appears here; it was a commendable act.

But the decisive answer is, that as by our statute it was lawful for the vendor so to apply the money, it could not be rendered unlawful for the purchaser to agree to such application, and to make it the condition upon which he purchased.

7th. My next proposition is, that our statute does not inhibit the payment of a debt by an absolute transfer of property free from any trust or reservation. The debt is a good consideration; and the statute is silent on the subject.—See proviso in the act. As to consideration, see *New.* 381; *Rob.* 434-6; 8 *T. R.* 528; 5 *T. R.* 238, 423. Why should not the same meaning be attached to the terms *bona fide* in our act?

We are answered by the argument that a preference may be given, which the statute meant to prevent. It is a common-law right, which authorizes a man to give this preference.—7 *Peters*, 614; 11 *Wheat.* 98. The statute does not in terms assail it. The argument is then preferred in support of the construction of our opponents, that being a remedial statute, and against fraud, it must be beneficially expounded.

But there is an opposing maxim, that statutes in derogation of common-law rights, must be strictly construed. Which shall prevail? Both may be preserved. We will endeavor to harmonize their apparently conflicting operations.—See *Rob.* 13, 14, 15, 544.

Again, it is said the Legislature, in passing the act of 1818, must have intended to accomplish something more than was found in 13 *Eliz.*

We submit they have done so, by inhibiting assignments in trust for particular creditors; whereby some advantage is gained to the debtor. And this last remark will explain the reason of the difference between what they have done and the inhibition of an absolute transfer. But if this were not so, the argument would not be sound. It is this—because the Legislature must have meant something which does not appear; you will determine what they did mean. But all the States have legislated on this subject, notwithstanding the English statute was in force in most of them. Why this?—See *Rob.* 10, n.

8th. My next proposition is, that if this view of the subject is not maintained, then the conveyance is void only when made by an *insolvent, voluntarily, in contemplation of*, and on the *eve of winding up*, and with the *intent to give a fraudulent preference*. Let us derive our reasoning here from the analogies of the law, and, 1st, from the bankrupt acts of England. Their great object was to secure equality in the distribution of a bankrupt's effects. So far the analogy is perfect. But they contemplated more, viz: that such distribution should be by law; and that it should discharge the debtor from the debt. Now, by the construction of this act, a debtor might prefer a creditor. *Newl.* 381-2; *Doug.* 92; 7 *Peters*, 614. There must be a time when the right to transfer becomes illegal; when the restraint upon the common-law right commences. Where will you fix it? Because otherwise you invalidate every sale by a man in *debt*, who happens to fail afterwards.

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the rule we lay down is not the true one, by what other rule will you assign the limits? Can this case be brought within that rule?

By the Court—WARNER, Judge.

The complainant in this case filed his bill for the purpose of setting aside a conveyance of certain real and personal estate, made by Philbrick to Eastman, on the ground such conveyance was fraudulent, according to the provisions of the act of 19th Dec. 1818.

The complainant charges in his bill that Philbrick remained in possession of two of the negroes, and furniture after the sale, and occupied the house in Brown Ward, so soon as the same was sufficiently completed for that purpose. The complainant also charges, the property conveyed was held in *trust* for the benefit of the vendor, or persons appointed by him. The answers of the defendants admit the possession of Philbrick, but state, at the same time, he held such possession by rent and hire from Eastman, and the terms thereof. The answers positively deny all *trust* of any kind. On the trial of the cause in the Circuit Court, the presiding Judge charged the jury "that possession of the vendor, after the sale, was *prima facie* evidence of fraud; and unless explained, became conclusive: that the explanation of that possession, stated in the answers, was *no evidence*, because not responsive to the allegations, or interrogatories in the bill." We think the court below erred in its charge to the jury, in stating the explanation in the answers of the defendants was *no evidence*, because not responsive to the allegations or interrogatories in the bill. There is no doubt as to the rule, when the defendant in his answer, insists by way of *avoidance* on any *distinct fact*, he must by evidence prove such fact, in order to make it available in his defence. But here, the complainant charges one of the defendants in possession of the property conveyed, as being *prima facie* evidence of fraud. The defendants respond, and say, true, he is in possession of the property, but holds the possession as the tenant of the vendee, paying him rent and hire therefor; which rebuts the presumption of fraud. The defendants do not insist on any *distinct fact* by way of avoidance, but respond directly to the charge of being in possession, and explain *how the vendor is in possession*. The complainant contends, the defendants ought not to have the benefit of their explanation of the possession. Although he had interrogated them about it, they must tell *part* of the truth only; or, if they do tell the *whole truth* in answer to his question, *part* only shall be received: so much only will be received, as will fix *fraud* upon them; the explanation exculpating them must be rejected. We do not so understand the rule, as to exclude the explanation of the possession given by the defendants in this case; the answers are responsive to the charge, that the vendor remained in possession of the property, explaining the nature of that possession: and not insisting upon a *distinct fact*, by way of avoidance, with which they have not been charged or interrogated by the complainant. "The answer of the defendant is evidence for him, so far as it is responsive to the call in the bill for discovery, or connected necessarily with the responsive matter, or explanatory of it."—*Methodist Church of Cincinnati vs. Wood*, 5th *Hammond's Rep.* 284-5; *Davis v. Irving, Russel and Mylne*, 64; *Lady Ormond vs. Hutchinson*, 13th

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Vesey, 53. We are of opinion the defendant's answers ought to have been submitted to the jury for their consideration, and let them have determined what credit they were entitled to; and that the court committed error, by entirely excluding that portion of them which explained the nature and character of the vendor's possession of the property conveyed. The next ground of error assigned, is the refusal of the court below to give the instructions prayed for by defendant's solicitor to the jury, that the conveyance of the property in question was not within the provisions of the act of 1818; but, on the contrary, the court did charge the conveyance by Philbrick to Eastman was within the provisions of that act. The act of 1818 affords a striking instance of inconsistent legislation, when we take into consideration the title of the act, the preamble thereto, and the enacting clause. It is said by those who profess to have been acquainted with its legislative history, the enacting clause was amended after its introduction into the legislature, without the title and preamble to the act having been amended, so as to conform thereto. How this may have been, we cannot say, as we have no *judicial* evidence of the fact now before us. We are to construe the act in accordance with established rules. By the enacting clause of the act, it is declared, "That any person or persons, unable to pay his, her, or their debts, who shall, at any time hereafter, make any assignment or transfer of real or personal property, stock in trade, debts, dues or demands *in trust*, to any person or persons, in satisfaction or payment of any debt or demand, or in part thereof, for the use and benefit of his, her, or their creditor or creditors, or for the use and benefit of any other person or persons, by which any creditor of the said debtor shall or may be excluded from an equal share or portion of the estate so assigned or transferred, such assignment, transfer, deed, or conveyance, shall be void, and considered in law and equity as fraudulent against creditors.—*Provided, nevertheless*, that nothing contained in this act shall prevent any person or persons in debt from *bona fide* and absolutely selling, and disposing of any part, or the whole of his, her, or their estate, so the same be *free from any trust for the benefit of the seller, or any person or persons appointed by him, her, or them.*"

The true meaning of a statute is generally and properly to be sought from the body of the act itself.—1 *Kent's Com.* 461. The great difficulty which has been felt in the minds of some in the construction of this statute, it is believed, has been in giving too much attention to the title and preamble, without carefully examining the enacting clause. The title of the act and the preamble are, strictly speaking, no parts of it. It is true they may assist in removing ambiguities where the intent is not plain, but where the words of the enacting clause are clear and positive, recourse must not be had to either of them.—1 *Kent's Com.* 460, 461. The *United States vs. Fisher*, 2 *Cranch Rep.* 358; *Crespigny vs. Wittenour*, 4th *Term Rep.* 793. What conveyances does the enacting clause of the act declare shall be null and void, and fraudulent as against creditors? Such conveyances only as shall be made by persons unable to pay their debts, *in trust*, &c. In order to make the conveyance void within the meaning of the statute, there must be a *trust* created for the benefit of the party making the conveyance, or for the benefit of some person appointed by him. This is manifest from the proviso in the act. 1-

order to remove all doubt as to the right of persons unable to pay their debts, to make a *bona fide* and absolute sale of their property, it is expressly declared: nothing contained in this act shall prevent any person or persons in debt, from *bona fide* and absolute selling and disposing of any part or the whole of his, her, or their estate, *so the same be free from any trust for the benefit of the seller, or any person appointed by him, her or them*. It was against assignments, transfers, and conveyances made by persons unable to pay their debts, *in trust for the benefit of the seller*, whether secret or otherwise, this statute was directed; not against those who were unable to pay their debts, but who made an *absolute* and *bona fide* sale of their estate. Such, it is believed, has been the contemporaneous construction given to the statute by our courts; there may have been some exceptions, it is true, but we speak of the general current of decisions. In June, 1834, the Judges of the Superior Courts held a convention at Milledgeville for the purpose of discussing and settling, so far as they could do, under our then imperfect system, such difficult and doubtful questions as the judges of their respective circuits might think proper to present. Judge Crawford, from the Northern circuit, presented this same question, growing out of the assignment made by Sims, Williams and Woolsey, of Augusta, to secure certain favorite creditors. All the judges of the State at that time were present, and concurred in the opinion (with one exception) that a debtor in failing circumstances could make an *absolute* and *bona fide* sale of his property to a creditor, provided there was no *trust* created for the benefit of the seller. The Legislature appear to have been satisfied with the construction given by the courts to this statute, inasmuch as no attempt has been made to control such construction by any legislative action. Indeed, we think such a construction is best adapted to the condition and habits of our people. If persons in debt were prohibited from making an *absolute* and *bona fide* sale of their property to a creditor or other person, it would oftentimes greatly embarrass, if not wholly ruin them. We are, therefore, of the opinion, a debtor in insolvent circumstances may make an *absolute* and *bona fide* sale of his property to a creditor in payment of a *bona fide* pre-existing debt, or to any other person, without such sale being obnoxious to the provisions of the act of 1818, so there is no *trust* reserved for the benefit of the seller. It appears, from the record in this case, the sale from Philbrick to Eastman was *absolute*, and the purchase-money proved to have been paid by Eastman. There was no evidence of any *trust* reserved for the benefit of Philbrick, within the intent and meaning of the statute of 1818. It was insisted on the argument that the stipulation between Eastman and Philbrick, that the debt due Stone's children, and the debt due Mrs. Abbott, should be paid out of the purchase-money by Eastman, was evidence of a *trust* within the meaning of the act. These debts were admitted to be *bona fide*, and due the parties by Philbrick. Instead of paying the money into Philbrick's hands, for him to take up his notes due Stone's children and Mrs. Abbott, Eastman pays so much of the purchase-money as is required to take up the notes, to the parties holding them, takes them up, and delivers them to Philbrick in payment of the property purchased. We see nothing in this arrangement affording the least evidence of a *trust*, or calculated to impeach the fairness of the transaction. We are, therefore, unanimously of the opinion the

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court should have given to the jury the instructions prayed for by the defendant's solicitors, and that it committed error in refusing to do so, and in giving the contrary instruction. Let the judgment of the court below be reversed, and a new trial granted.

No. 23.—ANDREW GIRTMAN, plaintiff in error, vs. THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA, defendants in error.

The act of 1843, amendatory of the act of 23d December, 1840, to define the liabilities of the several railroad companies in Georgia, for the loss of stock killed or wounded by the running of cars or locomotives, on their roads, and to regulate the mode of proceedings in such cases, is prospective in its operation, and cannot be applied to cases arising anterior to its passage.

Before the enactment of said statute, the Justices' Courts had no jurisdiction in any case sounding in damages, for any trespass on the person or property.

This was a suit originally brought in a Justice's Court by the plaintiff in error, against the defendants for the recovery of damages for stock alleged to have been killed on the railroad by defendants' cars running over them, anterior to the enactment of the statute of 1843, entitled "An act to amend an act to define the liabilities of the several railroad companies in this State, for the loss of stock killed or wounded by the running of cars or locomotives on their roads, and to regulate the mode of proceedings in such cases, assented to 23d December, 1840, and for other purposes."

To which suit the defendants in error pleaded, by way of exception, that the Justice's Court had no jurisdiction in the case, the action sounding in damages; that the Justice's Court was not a court of record; that the defendants in error could only sue or be sued in a court of record, under their charter; that the above-recited act of 1843 was unconstitutional and void, so far as it authorized suits against the defendants in error in a Justice's Court, which said exceptions were overruled, and judgment rendered for the plaintiff for \$11.44 and cost, from which the defendants in error appealed, and upon the trial before a jury in the Justice's Court, a verdict was rendered in favor of the plaintiff in error for \$8 and cost. Whereupon the defendants in error, by writ of certiorari, carried up said case to the Superior Court of the county of Chatham; and after argument of counsel for the parties, his Honor Judge Fleming took time to advise and consider of the said case, and of the questions involved therein; and on the 10th day of March, 1846, pronounced his decision, sustaining the said exceptions, and setting aside the proceedings in the Justice's Court: To which the plaintiff in error excepted, and assigns for error—

1st. The court below erred in deciding that the Justice's Courts of this State were not courts of record.

2d. The court below erred in holding that the Central Railroad

Banking Company of Georgia, was not liable to be sued in a Justice's Court.

3d. And the court below erred in deciding that the aforesaid act of 1843 was unconstitutional and void, so far as it authorized suits against the defendants in error in the Justices' Courts.

MULFORD MARSH, for the plaintiff in error.

The original action was in the Justice's Court to recover damages for stock killed by the cars on the Central Railroad. Judgment for plaintiff, and certiorari to Superior Court, upon the grounds stated in petition, and now to this court, on error.

1st. That justices' courts are not courts of record, so held by the Superior Court, when plaintiff contends they are courts of record, having by statutes power to fine and imprison.—*Prin. Dig.* 504; 508.

And they have extensive criminal jurisdiction, in all cases, over free persons of color or slaves, not extending to life or limb.—*Prin. Dig.* 789, 790.

Any court having power to fine and imprison, is a court of record. So expressly laid down by *Blackstone*, 3 vol. 24, 25; *Bac. Ab.* 101.

In the case of *Groenvelt vs. Burwell*, (1 *Salk.* 200,) the court held that a Corporation Court of Physicians of London, was a court of record, because they had power to fine and imprison; and this is the true test of courts of record, and not the enrolling the proceedings.

The Circuit and District Courts of the United States are courts of record, and yet the proceedings are not enrolled; they are filed, but not enrolled. Now, if *enrolling be the test, these courts are not courts of record.*

The judgments of justices' courts have equal *dignity* with those of superior courts.—*Prin. Dig.* 507. Now, how do we prove a judgment from one of the superior courts? By an exemplification of the record, the record proves itself.—3 *Blk. Com.* 24. And are not those of the justices' courts proven in the same manner? If not, do we not destroy their dignity?

Again, they are put expressly upon the same footing as to a claim of any money received of any officer, from sale of defendant's property.—*Act* 13, *Dec.* 1810; *Prin. Dig.* 435.

Suppose a sale had taken place by a sheriff, and the money be claimed by the judgment of the Superior Court, and judgment from a justice's court; both being equal in dignity, and entitled to the same claim for the money, if of equal date, how will we prove the judgments, one by the record, which cannot be gainsayed, and permit the other, of equal dignity, to be disputed? Equal of rank, of elevation, and yet not equal.—3 *Blk. Com.* 25.

In England, justice's courts are courts of record.—2 *Bac. Abr.* 101.

I shall consider the 3d and 4th points together

That the words of the charter, "to sue and be sued, plead and be impleaded in courts of record," are not words of grant, and convey no exclusive privileges.

The power of suing and being sued are the incidents of every corporation, and belong to them as soon as created.—2 *Kent Com.* 224; 1 *Blk. Com.* 475.

This is fully recognized and laid down by the court in the case of *Freeholders of Sussex vs. Struder*, 3 *Harrison Rep.* 117.

In this case, the court held these words *surplusage*; and so in the case at bar, strike out these words, and the company have all their chartered rights.

These words are only affirmative of the common law; and necessarily imply no negative, and are not to be construed to take away any common-law right. And one of the common-law rights which belongs to the public is that of suing the corporation in any court having jurisdiction of the subject matter of the suit.

This principle is fully laid down by the court in the following cases: *Critten- vs. Wilson*, 5 *Cowen*, 165.

The court, speaking of the statute in that case, says: "The act is not couched in negative terms. The remedy which it prescribes is cumulative merely, and not

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exclusive." So the words used are only those implied, and not exclusive.—6 *Bac. Ab.* 388; *Melody vs. Reab*, 4 *Mass. Rep.* 472.

The words *may* or *shall*, when used in a statute, are *imperative only when the public interest requires*.—*Malcomb vs. Rogers*, 5 *Concen*, 188.

This being a private corporation, the charter is not to be construed to take away any common-law right of others. This rule is laid down in *Coolidge vs. Williams*, 4 *Mass. Rep.* 143-44; *Sprague vs. Birdsall*, 2 *Couren Rep.* 419.

In this case, the court says: "In the construction of statutes made in favor of corporations or particular persons, and in derogation of common law right, care should be taken not to extend them beyond their express words or their clear import.—*Savage, Ch. J.*

Do the words in the charter clearly import that the public can only sue the Company in the Superior and Inferior Court, and that it can sue a citizen in those Courts for \$5, and collect, \$12 50 for costs? Is such the clear meaning of the charter? Would not such a construction be monstrous?

It is a maxim of the law, that an affirmative statute does not take away a common-law right.—6 *Bac. Ab.* 376.

Statutes are to be construed in reference to the common law.—1 *Kent Com.* 433. In *Wilbur vs. Crane*.—13 *Pick.* 290.

This court, speaking of the construction of a statute, says: "The rules of the common law are not to be changed by doubtful construction."

In the construction of statutes, this court has adopted the rule I am contending for in the case of *Doe ex dem. Truluck et al. vs. Peeples et al.* (*Ante*, 1 to 6.)

But the statutes of 1840 and 1843 are remedial statutes, and relate entirely to the remedy of the public against railroad companies for stock killed upon their roads.

And a statute, changing the remedy, unless by the burthens imposed it renders the remedy useless, is not a violation of the Constitution of the United States, as it impairs no contract. What portion of the charter is violated by those statutes?—can the court put its finger upon it? The statute permits the corporation to be sued, so does the charter, and the statute of 1843 permits suit where the damages are less than \$30, in a Justice's Court in the district where the president resides. What words of the statute prohibit this, and what right is taken away by this statute?—*Charles River Bridge vs. The Warren Bridge*, 11 *Peters*, pp. 544, 545, 546; *Satterlee vs. Matheuson*, 2 *Peters*, 411, 412, 413; *Bronson vs. McKinzie*, 1 *How.* 315; and see *Justice M'Lean's opinion*, 325, 328, 332; *Story on the Constitution*, vol. 3 pages 250, 351, sec. 1379.

But, in cases of doubt, the court should always hold the law constitutional.

The presumptions are always in its favor, and it should never be set aside, unless in cases entirely free from doubt.

This is a rational rule; for the Legislature enacts the laws under an oath to support the constitution, and the great object of the veto power in the executive is to preserve the constitution from violation by hasty legislation, and he sanctions the laws under a like oath to support the constitution.

The following cases fully support the principle.—*Cooper vs. Telfair*, 4 *Dallas' Rep.* 14; (1 *Cond. Rep.* 211.)

In this case, Washington, Justice says: "The presumption, indeed, must always be in favor of the validity of the laws, if the contrary is not clearly demonstrated."

Can any one say that it is clearly demonstrated in the charter that the corporation cannot be sued in any court having jurisdiction of the subject matter of suit?

And in the same case Patterson, J. says: "To authorize this court, (the Supreme Court of the U. S.) to pronounce a law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful argumentative implication."

What language can better suit this case? To declare the act of 1843 void, would be a doubtful implication.

I now submit to the court whether I have not shown, by authority which this court will recognise and sanction,

1st. That the Justices' Courts of this State are inferior courts of record.

2d. That the words "sue and be sued, &c, in courts of record," in the charter of the defendant, are not words of grant.

3d. That they are merely affirmative of the common law.

4th. That the acts of 1840 and 1843, defining the liability of railroad companies, are remedial and constitutional.

And lastly, That the presumption is always in favor of the constitutionality of a law, and that the plaintiff is entitled to the judgment of this court, reversing the judgment of the Superior Court of Chatham county, and dismissing the certiorari granted by that court in this case.

ROBERT M. CHARLTON, representing COHEN, for defendants in error.

By the Court—WARNER, Judge.

The plaintiff instituted his action in the Justices' Court, to recover damages from the defendants for killing his stock with their railroad cars. It appears from the record in this case, the stock was killed before the passage of the act of 1843. Before the passage of the statute of 1843, Justices of the peace had no jurisdiction to try cases sounding in damages, for any trespass on the person or property of the plaintiff.—*Prin. Dig.* 432-3. The act of 1843 was intended to operate *prospectively*, as is apparent from its terms; and to give parties injured, the right to sue in justices' courts for damages done their stock by the railroad companies *subsequent* to its passage. The stock of the plaintiff in this case having been killed *before* the enactment of this latter statute, the justice's court had no jurisdiction to maintain the suits against the defendants to recover damages therefor; consequently we are of the opinion the judgment of court below should be affirmed on that ground. This view of the question renders it unnecessary for us to express any opinion as to the other grounds taken.

Let the judgment of the court below be affirmed.

No. 24.—JOHN E. DAVIS, Sheriff, JOSEPH JONES, CHARLES WEST, ROSWELL KING, Trustees, &c., and EDWARD STILES, plaintiffs in error, vs. GEORGE W. ANDERSON and BROTHER, defendants in error.

Although a security on appeal is interested, by reason of his suretyship, and therefore incompetent as a witness for the appellant,—yet his competency may be restored, by the substitution of another security in his place, under an order of the court, taken for that purpose, which, for the advancement of justice, the court ought to permit upon application. The refusal to allow it is error.

The motion for substitution being made by the parties, for their benefit, they could not take advantage of it: And the order of the court, entered upon the minutes, would make the record sufficiently intelligible.

A mortgage would be obnoxious to the provisions of the act of 1818(a) and void, if used as an instrument of fraud, for the purpose of securing to the mortgagor a secret trust, or benefit, within the intent and meaning of said act.

But a mortgage, executed by a debtor, in insolvent circumstances, to a creditor, to

For the statute of 1818, see *Eastman and Philbrick vs. McAlgin*. Ante.

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secure the payment of a *bona fide* pre-existing debt, is not *per se* fraudulent, as against creditors.

A mortgage in Georgia, is nothing more than a *security* for the payment of a debt; and the title to the mortgaged property remains in the mortgagor, until foreclosure and sale, in the manner pointed out by statute.

This was a bill in equity, tried before Judge Fleming, in Chatham Superior Court, January Term, 1846. The bill was instituted at the instance of the defendants in error against the plaintiffs, charging that on or about the 2d day of June, 1840, the complainants advanced to Edward Stiles, at his request, the sum of \$2,125 86, and took his note for the same, payable on the first day of December thereafterwards: that on the 30th of that month he paid them on said note \$592 01, and subsequently on the 20th of February, 1841, the further sum of \$89 75, leaving still due and unpaid the sum of \$1,475 26; that the complainants, having ascertained that said Edward was greatly embarrassed in his circumstances, and believing him to be insolvent and unable to pay his debts, instituted suit against him for said balance in the Inferior Court of said county of Chatham, returnable to May Term, 1842, of said Inferior Court; and at the January Term, 1843, recovered judgment against him therefor, with interest and cost, and from which execution was issued. That about the 19th of April, 1842, and but a few days after the commencement of said suit by the complainants, the said Edward being in failing circumstances, and unable to pay his debts, as they believed, executed to Joseph Jones, Charles West, and Roswell King, junior, (three of the plaintiffs in error,) as trustees of Caroline Clifford Stiles, a mortgage of nine negro slaves, to secure the payment of three notes, bearing date the 1st of January, 1836, and payable respectively at one, two, and three years after date thereof, and the interest, which up to that time had accrued, being debts long antecedent to, and not contracted at the time of the execution of said mortgage. That said mortgage was executed in the county of Chatham aforesaid, and having been made and executed by the said mortgagor to secure debts long antecedent, and at a time when he was unable to pay his debts, with interest, *to prefer the said mortgagees, and to exclude the other creditors of the said mortgagor from an equal share or portion of the estate so assigned, transferred and mortgaged, and said mortgage containing a condition that the surplus of moneys arising from the sale of said negroes, after payment of said notes, amounting to \$798 98 principal, besides interest and charges, should be returned to the said mortgagor, being a trust in favor of him, the said Edward, was under the laws of Georgia aforesaid null and void, and considered in law and equity as fraudulent against creditors.* Notwithstanding which, the said trustees caused the said mortgage to be foreclosed at the February Term, 1843, of the Superior Court of the said county of Chatham, and execution to be issued thereon, and required the said John E. Davis, sheriff of said county, (one of the plaintiffs in error,) to sell said nine negroes, so illegally mortgaged, under the execution issuing from said foreclosure in favor of said mortgagees, and to pay over the proceeds of said sale to said mortgagees, the trustees aforesaid; and the said sheriff proceeded to sell said slaves, and holds in his hands, as sheriff, a large sum of money, being such proceeds, which are claimed under the aforesaid illegal mortgage, so foreclosed as aforesaid. That the complainants had request-

said trustees to desist from their said claim, founded upon said illegal mortgage, and to permit the complainants, with other judgment creditors of the said Edward, to share *pro rata* the said proceeds, and to permit the said John E. Davis, sheriff as aforesaid, to retain said proceeds, to be applied to the payment of said judgments, &c.; and concluded with a prayer for injunction, and for a decree directing said proceeds to be paid over to the judgment creditors, wholly disregarding the claims set up under the said mortgage, and for general relief, &c.

The plaintiffs in error, who were defendants in said bill, answered, admitting the sale of the negroes under the mortgage *fi. fa.*, and the proceeds of the sale held up in the hands of the sheriff, except so much thereof as was necessary to pay costs, and an execution older than the mortgage; the balance left on hand being \$1,017 73. Divers executions against said Edward Stiles, besides the mortgage *fi. fa.*, were in the hands of the said sheriff, unsatisfied; and it appeared that he had no other property at the time of the levy, except the mortgaged negroes.

The said Edward Stiles, answering the bill, stated that he had, mortgaged to the defendants in error, to secure the payment of their said debt, a tract of land in the county of Bryan, of five hundred acres first quality inland swamp, called "Crow-lane," with the improvements thereon, worth, as he believed, three thousand dollars at the time of giving the mortgage in 1841; and at the time of his answer it was worth \$2,000. That said mortgage had never been foreclosed, and remained of force and effect, and was the oldest lien against him. That sometime in the year 1836 he purchased a plantation called "Selina," in the county of Bryan, from said trustees, and gave a mortgage upon it to secure the purchase-money. In April, 1842, the said Edward, being desirous of disposing of said plantation, proposed to said trustees, or their agent, to give up the mortgage thereon, and that he would substitute in its stead a mortgage on the nine negro slaves referred to in said bill, the amount of the notes and the interest accrued thereon being then nearly twelve hundred dollars, which was accepted, and the mortgage on the negroes aforesaid was executed and delivered. That at the time of executing said mortgage he was solvent, and able to pay his debts with his property at a fair valuation. That said mortgage was executed in good faith, and with no view of excluding any one of his creditors from a fair and just participation of his estate, which he believed to be ample for the payment of his debts at a fair valuation; nor did he have any view of securing to himself any benefit by way of trust, to the exclusion of his other creditors, for any surplus remaining after satisfaction of said mortgage to the trustees. That he had no intention to prefer one of his creditors to another, or to reserve any trust to himself, to the exclusion of his creditors.

The answer of the trustees corroborated that of the said Edward Stiles as to the mortgage on the place called Selina, and the consideration therefor, and the circumstances under which the same was given, and the substitution, in its stead, of the mortgage upon the nine slaves, and the reasons therefor: They stated that the whole matter on the part of the trustees was conducted by the Reverend Joseph C. Stiles, the husband and father of their *cestui que trusts*, who, they believed, had no sign whatever to defraud any of the creditors of the said Edward as in the said transaction; they had no knowledge at the time of the

execution of the mortgage on the slaves, that the said Edward Stiles was in failing circumstances. They denied the fraudulent trust charged in the bill, and insisted that the condition embraced in the mortgage, which entitled said Edward to any surplus, was not such a trust as was contemplated by the statute, because without such condition the said Edward would have been entitled by law to any such surplus.

Upon the trial of said bill in the court below, the solicitors for the plaintiffs in error offered Benjamin Edward Stiles as a witness, who was objected to on the ground of interest; which objection being overruled, and the witness examined, it was subsequently discovered that the said witness was a surety of the plaintiffs in error on their appeal bond in the case, and the objection was again renewed on this ground:—their counsel contended that the objection came too late, which being overruled by the court, they moved to substitute another surety in the place of the witness, but the presiding judge decided that the appeal bond could not be altered for that purpose; that it would not then be the bond which had been filed, and the appeal would be filed without bond within the time prescribed by law. Whereupon the counsel for the plaintiffs in error excepted.

The counsel for the plaintiffs in error then submitted to the court that a mortgage was not such an assignment, transfer, or conveyance in trust as was intended and embraced, under and by the provisions of the act of Georgia of 1818, to prevent fraudulent conveyances, to deprive creditors from an equal distribution of an insolvent's estate, and that under the laws of Georgia, a mortgage was but a security for a debt, and did not change the ownership of the property: And the presiding judge decided, and so charged the jury, that a mortgage was such an instrument as was embraced under the said act, if made under the circumstances stated in said act, to bring it within its operation. To which the counsel for the plaintiffs in error excepted.

The counsel for the plaintiffs in error then submitted to the court, that if a mortgage was an instrument embraced under the act of 1818, it could only be so, when made by an insolvent to secure an antecedent debt, under the apprehension and in expectation of immediately winding up, and with the intent and motive to give a fraudulent preference; and the said court decided, and so charged the jury, that if the party was insolvent at the time the mortgage was made, it was within the act, although neither the mortgagor nor mortgagee knew of such insolvency at the time; and although they did not act under the motive or with the intent to give a fraudulent preference, and although the mortgagor was wound up by executions twelve months after the date of the mortgage, provided that the jury should be satisfied that the mortgage was voluntary, and not forced by the vigilant creditor. To which the counsel for the plaintiffs in error excepted.

In behalf of the plaintiffs in error it was proved on the said trial that in 1836 the said trustees sold to the said Edward Stiles a tract of land in Bryan county, called Selina, for (\$800) eight hundred dollars, and took three promissory notes, bearing interest, in payment; and to secure which notes the said trustees took a mortgage from the said Edward Stiles, the vendr on the said Selina plantation; that in the same year the said Edward Stiles exchanged the said plantation for another with Alexander Stiles who had knowledge of the mortgage, and under an agreement by

Stiles to procure the removal and cancellation of said mortgage; that in April, 1842, upon the arrival of the said Joseph C. Stiles into Georgia from Kentucky, he being the husband and father of the *cestui que trusts* of the Selina plantation, the said Edward Stiles arranged with him, by the consent of the said trustees, to substitute a new mortgage upon nine slaves, to secure the said notes and interest, in the place of the mortgage on Selina, which new mortgage being taken, the old mortgage on Selina was given up to the said Edward Stiles; and the counsel for the plaintiffs in error thereupon submitted to the court that, under these facts, the latter mortgage on the negroes could not be within the provisions of the act of 1818, even admitting the insolvency of the said Edward Stiles at the time, because the relinquishment of the old mortgage was a present good and valuable consideration for the new; and the said court decided, and so charged the jury, that the new mortgage was for the security of the notes, and the interest which had accrued from 1836 to 1842, when the mortgage was given; that the interest was a sum greater than the value of the Selina plantation and mortgage on it; and that so far as the new mortgage was given to secure the interest, it was within the statute, and so far void; and that being void in part, it was, by the act, void altogether. Whereupon the counsel for the plaintiffs in error excepted.

Upon these several exceptions the error was assigned.

L. S. DE LYON, for plaintiffs in error.

In compliance with the rule of the Supreme Court, the counsel for the plaintiffs in error, furnish a note of the points or questions intended to be made by them.

1st. The plaintiffs in error maintain that the court erred, in allowing the objection to the witness, Benjamin Edward Stiles, on the ground of his being a security on the appeal bond; because, they say, that having been put upon his *voir dire*, and then sworn in chief, he could not afterwards be objected to, on proof of specific grounds of interest.—*Greenleaf Evid.* 470, 471.

2d. That the court erred, in refusing to allow other security to be substituted.—*Greenleaf Evid.* 477; 1 *Phil. Evid.* 136, 2 *Cow. notes*, 270, and cases there cited; 3 *Wend.* 376; 3 *Cow.* 257; 2 *Hawks.* 336; 8 *John. Rep.* 407.

3d. That a mortgage is not such a conveyance as is embraced within the act of 1818.

1st. Because the equity of redemption reserved to the mortgagor, is not such a trust as is contemplated by the statute. It is at all times open to his creditors, who may redeem or levy upon it.—2 *Kent Com.* 535-6, n.

2d. Because it is but a conditional conveyance, the mortgagor in Georgia remaining the owner of the property, and the mortgage considered only as a security for the debt.—1 *Story.* 351, 360; *Georgia Decisions*, 76.

3d. In England, the estate becomes absolute in the mortgagee, upon condition broken. Not so in Georgia. The mortgagor, here, is only divested by judicial process.—4 *McCord. Rep.* 336. This is expressly provided in New York and South Carolina by statutes.—2 *Paige*, 592; *Rice's Eq. Rep.* 383.

4th. The plaintiffs in error will further maintain, that if a mortgage be embraced by the act, this case is not within it.

1st. Because *indebted*, in the act, means *insolvent*.

This construction is authorized by the construction of other acts, *in pari materia*: for example, the statute 13 *Eliz.*; *Newl. on Contracts*, 384-85.

What, then, is technical insolvency?—3 *Cranch Rep.* 90, 91; see 1 *Peters S. C.* 439. When, then, may a mortgage be embraced? When made by an insolvent in contemplation of an immediate winding up, with intent to give a fraudu-

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lent preference, (1 *Spear's Eq.* 554,) and it must be voluntary.—*Douglass*, 88, 92; 1 *Wash. Cir. Co. Rep.* 34-5; *American Jurist*, 1 vol. 197, do. 9.

2d. Because the plaintiffs in error, the trustees, had an equitable lien on Selina plantation, for the purchase-money, in addition to which they took a mortgage on Selina. This mortgage did not extinguish the equitable lien, but made that a legal claim, which before was only equitable.—*Story's Eq.* ; 15 *Vesey*, 341, 16; *Vesey*, 278, 280; *Sugden on Vendors*, 386-87.

5th. This equitable lien would follow the Selina plantation.

The surrender of this lien, and the mortgage on Selina, which went to the benefit of Stiles' creditors, for a specific lien on the negroes in the new mortgage, and a specific lien is always preferred to a general lien.—*Story*, 402-3, n. 1; 3 *Dess. Rep.* 74, n. 1; 1 *Paige*, 130, 3; 2 *Paige*, 590, 26.

The original agreement, between the vendors and vendee of the Selina plantation, to secure the purchase-money, will be enforced by the court, whether the security was executed or not. Equity will consider that as done, which ought to have been done.—1 *Bailey's Eq. Rep.* 223, *Alxander vs. Heriot*.

The fund being in court, a court of equity will, under such an agreement, even against creditors, decree it to be a specific lien.—2 *Vesey, jr.* 573, 582.

When the equities are equal, the maxim is *qui priori est, in tempore, potior est in jure*.

But in this case, the equity of the plaintiffs in error is clearly superior. All which is respectfully submitted.

THOMAS E. LLOYD, for the defendants in error.

Upon the trial of the above case, Benjamin E. Stiles was offered as a witness for the defendants, and objected to on behalf of complainants' solicitors on the ground of interest, which objection was overruled; the defendants' solicitors stating that the witness was not interested. Subsequently, during the course of the trial, it was discovered that the witness was the security of the defendants, on the appeal bond, and the objection was renewed, and the testimony of the witness ruled out, the motion being resisted by the defendants' solicitors on the ground that the objection came too late.

The defendants then moved to amend the appeal bond by striking out the name of Benjamin E. Stiles, and substituting another in his place as security; thus to render him competent as a witness, which motion was refused by the court.

The exceptions taken to the decision of his Honor Judge FLEMING on these points form the first ground of error complained of.

The testimony of Stiles was inadmissible on the ground of his interest, having by his bond obligated himself to pay the eventual condemnation money. He was likewise liable for costs and also damages, should the jury have considered the appeal frivolous and intended for delay. It was a certain, direct and positive interest depending upon the result of the decree and judgment which was to be effected by his own testimony.

His liability for costs was a sufficient disqualification. Upon this point the authorities found in text books and reports are unanimous, to a degree remarkable in legal questions, and sustain the objection to the competency of a witness on this ground, even though he be an executor, trustee or officer of a corporation, with a remedy for reimbursement out of the public or trust funds.—1 *Greenleaf on Ev.* p. 447; 1 *Stra.* 548; 5 *East.* 7; 1 *Doug.* 139; *Gresly Eq. Ev.* 242-3-4; 16 *Mass.* 118, 121; 20 *John.* 142; 1 *Phillips on Ev.* p. 45; 1 *Starkie*, 136; 2 *Smith's L. C.* p. 63; 19 *Vesey*, 434.

It may then be considered as settled that Stiles was an incompetent witness. Did the objection come too late?

It is conceded that under the old rule of law the objection to a witness must have been taken upon the *voire dire* before examination, and that after discovered in¹ est was no ground of objection; but this rule was shaken, if not destroyed,²

case of *Turner vs. Pearle*, (1 T. R.) and it may be safely laid down as the modern rule :

That a witness may be objected to on the ground of interest whenever, during the course of the trial, it appears that he is interested.—1 *Greenleaf on Ev.* p. 467; 1 *Starkie*, 124; 1 *Phillips*, 96; 13 *Mass.* 381; 2 *Camp.* 14; 6 *John.* 537; 1 *Esp.* 37.

But farther let us look to the reason and spirit of the rule, by which a party was compelled to examine a witness upon his *voire dire* before he was examined in chief.

It is said (*Greenleaf on Ev.* p. 467) that a party shall not lie by, and “see if the testimony of an interested witness makes for or against him, and then object, if he find it unfavorable.”

The complainants’ solicitors objected to this witness before he was put upon his examination in chief; they did not lie by, but objected from the time he was offered to them :

“*Cessante ratione cessat et ipsa lex*,” is a maxim which should apply with peculiar force to these cases, in which the discretion of the court is so largely exercised.

Again, it is said, that perchance, if the objection had been taken upon the *voire dire*, the witness might have been released. The objection was taken before the testimony was closed in the case, and the defendants had full time to render the witness competent, had such a course been in accordance with the opinion of the presiding judge.—1 *Phillips on Ev.* p. 132.

The defendants have been in no way prejudiced. The act by which the witness was rendered incompetent was their own deed. They were fully aware of it. The name of the solicitor of record appears on the bond in juxta position with that of the witness. It was not disclosed when the objection was first made to the witness as interested, and after the objection was originally made, the *voire dire* was waived upon the statement of witness and counsel, that the witness had no interest. We again appeal to the discretion of the court if, under circumstances like these, the objection came too late.

Had no objection been made at first, it might have been presumed that the complainants’ solicitors were at the time aware of the objection, it being a matter of record. Is it probable that they would have urged an objection, and omitted in their argument to mention a fact, which would have been decisive of the question?

In support of the above views may be added legal authority. But if, notwithstanding every ineffectual endeavor to exclude a witness on the ground of incompetency, it should afterwards appear incidentally in the course of the trial that the witness is interested, his testimony will be stricken out, and the jury will be instructed wholly to disregard it.—1 *Greenleaf on Ev.* p. 468.

In all these cases the objection is to be considered as though it had come upon the “*voire dire*,” or first objection.—13 *Mass.* 381.

Had this fact been shown to the court upon the first objection made to the competency of the witness, he must have been excluded. The fact having afterwards been discovered, and brought to the notice of the court, it may well be taken as part and parcel of the original motion, being only a continuation or renewal of it.—13 *Mass.* 381.

There was no error in the court’s refusal to allow the appeal bond to be amended.

The record of a court cannot be varied.

Though in some instances the record at the same term may be amended, where it is manifest that error has been committed in making up the record, yet can an instance be found in which a motion has been made to the court to alter or expunge from and add to its own record for the convenience of a party whose own act had placed him under the necessity of making the demand?—5 *Comyns’ Dig.* 395; *Sal.* 567.

The appeal bond is a matter of record, regularly entered on the minutes of the court, which are signed by the presiding judge. After such signature, they become records of the court, and a sanctity in a legal point of view attaches to them, which the judge himself cannot violate.

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At the common law, *the record*, after term passed, could not be amended in the smallest particle, after it was once made up. By the statutes of Jeofails, amendments were allowed in certain cases. But there is neither statute nor common law which allows the judge to *alter* the record, where under no view of the case can such alteration be called an *amendment*.—2 *Irvin's Ab.* pp. 289-90.

By the statute law of Georgia, it is made penal for any judge to "alter" the record. This law has never been considered as repealing the statutes of Jeofails, allowing amendments, but it certainly forbids most positively any "alteration" which does not come under those statutes.—*Princes' Dig.* 638.

The class of cases relied upon by counsel for the motion to substitute, are cases in which bail being witnesses, the party has been allowed to give a new bail bond or deposite the money in court.—1 *Greenleaf Ev.* p. 477.

But the distinction is evident. Bail is but an incident to the case, and a bond or deposite, which relieves the mind of the witness from any bias or interest, may again render him competent.

But the motion in this case was to *alter the appeal bond* by striking out the name of a witness, and substituting another name.

Now, the appeal bond was the ground of the jurisdiction of the court. It is required by law that this bond should be given within four days, or the appeal must be dismissed. Had the name of the witness been stricken out, and another substituted, the bond must have been attested by the clerk as having been signed on the day when the motion was made, nearly one year after the date of the appeal.

Would not such an alteration have necessarily involved a dismissal of the appeal?

Had such a motion been made and overruled, upon error to this court, would not the court have dismissed the appeal, trying the record by the record itself, parol evidence being inadmissible to explain the record?

The presiding judge could not have ordered the bond to be signed by the substituted surety, because

"The appeal must come up regularly from the court below, and so continue. The moment the record is vitiated, the jurisdiction of the court ceases. The appeal can only be had upon certain conditions, and if those conditions are violated or not complied with, there is no appeal. Had the motion in this case been to deposite a fund in court sufficient to have answered all damages and costs, or a counter bond to save harmless, it might have been entertained; but it being a motion to alter or expunge from and add to the record by striking out the name of a security and replacing it by another in an appeal bond, the regularity of which alone gave jurisdiction to the court over the case, it was clearly not error on the part of the judge presiding below, to refuse such an application.—4 *Cowen*, 80, 540, 587, 9, 227. 3 *Mason*, 444-5.

The third ground of error assigned is, "that the presiding judge decided, and so charged the jury, that a mortgage is such an instrument as is embraced under the said act (the act of 1818), if made under the circumstances stated in said act to bring it within its operation."

The words of that act are, "Any assignment, transfer, deed or conveyance," coming within the circumstances stated in said act, shall be set aside as null and void.

A mortgage is embraced in the very words of the act.

A mortgage is a conveyance or transfer of real or personal estate, to secure the grantee or assignee the payment of some debt.—9 *Encyclopedia Am. tit. mortgage.*

A mortgage is a conveyance.—4 *Kent Com.* 135, 153; 2 *Cruise's Dig.* p. 80.

It is a transfer.—18 *Law Library*; 18 *Encyclopedia Am. tit. mortgage.*

It is a deed, because it is a writing, sealed and delivered.—2 *Black. Com.* 295.

A mortgage is in effect the old deed of defeasance, which is enumerated by Blackstone among the regular common law *deeds of conveyance*.—5 *Bacon's Ab.* p. 3; 2 *Black. Com.* 327.

"A mortgage is where a party borrows money, and grants him an estate in fee" Under the statute of frauds, this can only be by deed.—2 *Black Com.* 158.

It is spoken of in the statutes of the State as "deed of mortgage," (*Prin*

p. 165,) and the same solemnity is required in the attestation as in that of any other deed.—*Prin. Dig.* 166.

It has been so far considered a transfer of the property, that by express statute it has been enacted, that the dower of the widow of the mortgagor should not be barred, unless she consented to the mortgage.—*Prin. Dig.* p. 161.

A mortgage is an assignment.—5 *Bacon's Ab.* p. 6.

The mortgage states, on its face, that it is an indenture, which is a deed of the most solemn kind.—2 *Black. Com. tit.* p. 238.

These authorities prove that a mortgage is within the very letter of the statute.

They are likewise within its spirit. The object of the statute is to prevent persons who are unable to pay their debts, from making any assignment or transfer, deed or conveyance, to any particular creditor, by which other creditors may be excluded or defrauded from their just share in the property so conveyed, assigned or transferred.

A mortgage is the most ready, easy and common method by which this is done. In vain would the Legislature of Georgia have passed this law, if a mortgage is to be excluded. To give the statute this construction, would be to render it as useless to the ends proposed as was the statute of uses, (27 *Henry VIII.* c. 10,) which is said to have added but three words to the conveyance intended to be abolished.

This construction would add but the defeasance to a deed, and the fraud sought to be prevented would continue in unabated force.

The object of the Legislature seems to have been, to pass a law of equality to creditors, by which, so soon as a debtor became unable to pay his debts, his power over his property, so far as it tended to the injury of any or either of them, was suspended, and he was left only as a trustee of the fund, to pay the creditors in their legal priority then existing, or afterwards to be obtained.

If this creditor can exclude and defraud certain creditors, by giving mortgages of his entire estate to others, is not the law a dead letter?

There is one rule to be borne in mind, in construing this statute. It is "a statute against frauds is to be construed liberally."—1 *Black. Com. n.* p. 88.

"Remedial statutes must be construed according to their spirit; for in giving relief, or in the furtherance or extension of natural right and justice, the judge may safely go beyond even that which existed in the minds of those who framed the law."—1 *Black. Com.* p. 62; note by *Christian*.

The construction that a mortgage is within the statute is supported by able and learned decisions.

Mr. Justice Nott, delivering the opinion of the Court of Appeals in South Carolina, says of a mortgage under this act: "I think, therefore, that the terms of the act are broad enough to embrace the transfer now under consideration, and I am of opinion that the spirit of it requires that it should receive such a construction."—*The Bank of Georgia vs. Henry Schultz*.

Judge Johnson, than whom an abler man scarcely sat upon the Supreme Bench, decided that a mortgage was within the act. "We are clearly of opinion, that the deed is expressly within the words of the act, as to the previously existing debt."—*Schultz & Briethaupt vs. Bank of the State of Georgia, et al.*

"It matters not, in my opinion, what the form of the transfer is, or by what apparatus the fraud is perpetrated; the act will condemn it."—*Johnson Ch.*; 1 *Spear's Eq.* 554.

"Whether a mortgage is within the words, assignment or transfer, found in the statute of Georgia, came directly before the Court of Appeals in the case of the Bank of the State of Georgia, against Henry Schultz, in January Term, 1827, in which it was held that mortgages are embraced by them."—1 *Spear's Eq.* 589.

That a mortgage is within the act of 1818, has been decided upon solemn argument on a motion for a new trial in the Eastern circuit.—*G. W. Anderson & Brother vs. Wyllly, et al. MSS.*

In the opinion of Chancellor Kent, they are also within the statute.—*Written opinion*, p. 3; *Habersham vs. Screven*.

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There has been made in the middle Circuit of Georgia, a contrary decision, by Judge Shly.—2 *Part Geo. Dec.* 76.

Of this decision it may be remarked, that it is made with entire ignorance of any decision to this point, with the exception of one of Judge Montgomery's, which it overrules, and which decision sustains the complainants in this case. Taking into consideration that the decision in South Carolina, above cited, and also the one in the Circuit Court, (which arose out of a matter occurring in the very county in which Judge Shly decided, and a matter which attracted great attention,) had been decided, and some of them in printed reports, long anterior to the decisions of Judge Shly, we come to the necessary conclusion that the latter decision must have been hasty, and without that research and attention which alone entitles judicial decisions to respect, where they are not controlling.

The reasoning by which Judge Shly came to the conclusion in his decision, is equally fallacious.

It is in substance, "That the laws of Georgia having given an additional remedy to mortgagors, have thereby entirely changed the nature of the conveyance, admitting that, except by the operations of this statute, a mortgage would be within the act."

This remedy is but cumulative, and there are many circumstances which might induce a party to pursue this course, but it is apprehended that the common law method of a foreclosure might still be used.

If, after condition broken, the mortgagee were to take possession of the property, would ejectment or trover lie by the mortgagor for the property? Has not the mortgagee the legal title?

It has been decided that after the sale of the equity of redemption a mortgagee may bring ejectment for the premises.

After the sale of the equity of redemption in Georgia, under the form of our mortgage conveyance, could not the same action be brought? If the mortgagee foreclose, (allowing the statute not to be cumulative,) he must foreclose in this way, but is there in that statute any provision that he shall be excluded from his other common law remedies, if he do not choose to foreclose.—10 *John.* 481.

Subsequent acts of Parliament in the affirmative, giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties ordained by preceding acts of Parliament, without negative words."—*Middleton and wife vs. Crofts, in Sanders' Atkins*, pp. 674, 675.

And this statute, being in derogation of the common law method of proceeding, must be construed strictly, and without giving scope to implication.

That such is the ordinary construction, is evidenced by the repealing clause annexed to all statutes.

To the authority of this decision, we oppose those of Judge Montgomery, Judge Henry, and the decision of his Honor in the court below.

"Alia lex Roma, alia Athenis—our appeal is unto Caesar."

It has been decided that the mortgagee of personal property is the legal owner of property, after condition broken, the equitable estate alone remains in the mortgagor.—8 *John.* 96; 2 *Vesey, jr.* 378; 1 *McCord. Ch.* 486; 6 *John.* 258; 9 *Wend.* 80; 12 *Wend.* 61; 1 *Peters*, 441.

As before stated, there may be several reasons which might induce a person to desire a foreclosure, instead of taking the property into his possession. He may have sued upon the note or bond, and wish to sell the mortgaged property, to ascertain the difference between its value and the debt, as until such an ascertainment, he might be enjoined by other creditors from touching other funds; but there is nothing which compels him to foreclose; if he can obtain possession of the personal property, he may retain it, and drive the mortgagor to his bill in equity to redeem. Is he not then a trustee?

In Ireland the mode of foreclosure is the same as in our State, yet we do not find that the character of the conveyance is altered.—13 *Vesey Rep.* p. 204.

The third ground of error may be best considered by ascertaining the requi-

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which must attach to any conveyance, to bring it within the act. The following are the requisites, as they appear upon the face of the act :

1st. The grantor must be insolvent.

2d. The consideration must be an antecedent debt, that is, to one who was a debtor at the time.

3d. It must be given under circumstances whereby any creditor may be excluded from an equal share or portion of said property.

4th. And that "it be not free from a trust for the benefit of the seller, or any person or persons appointed by him, her, or them."

That these instructions of the court to the jury, upon these points, were correct, so far as it went, was not disputed by the defendants' solicitors; but they asked further instruction, which the court refused to give. That the conveyance was not within the act, unless it was made "under the apprehension and in the expectation of immediately winding up, and with the intent and motive to give a fraudulent preference."

The court committed no error in refusing this charge, and in deciding that the knowledge and intention of the parties did *not* effect the matter.

To sustain this view of the case, we refer to the words of the act itself:

"Any persons unable to pay his, her, or their debts, who shall hereafter make any assignment or transfer," &c. "by which any creditor of the said debtor shall or may be excluded from an equal share or portion of the estate so assigned or transferred," "such conveyance shall be null and void."—*Prince's Dig.* 164, 165.

These are the words of the act. There is nothing in them which requires the party to be under the apprehension and in the expectation of winding up his affairs.

The act speaks of an insolvent, and further qualifies the idea of technical insolvency by defining what the legislature meant as such: "One unable to pay his debts."

A man may be utterly and hopelessly insolvent, and yet have no intention of winding up his affairs. He may shut his eyes blindly to his situation, and keep on. Men seldom set to work to wind up their affairs; it is an office which is usually performed for them by their creditors.

There is nothing in the words of the act which says, "there shall be an intent and motive to give a fraudulent preference." The word "intent" or the word "preference" does not occur in the preamble or body of the act; it only speaks of a conveyance by which "creditors may be excluded." It is the fact of exclusion and not the intention of preference which brings a conveyance within the view and operation of this statute, and the absence of all intention of course dispenses with the necessity of knowledge.

Where the words of a statute are clear and distinct, there is no room left to the court for implication. "Cum inciditur a lege judex transit in legis latonem."

We may make this additional observation: that this being a statute against fraud, is to be construed liberally—construed so as to embrace every conveyance which may fall within its spirit, not to exclude them by adding requisites of which the law makes no mention.

A comparison of this statute with one of a sister State, will show that the legislature did not intend to attach these requisites, or they would have so stated.

"If a debtor, within six months," "being insolvent or in contemplation of insolvency, shall directly or indirectly make any assignment, sale, transfer or conveyance, either absolute or conditional, of any part of his estate, real or personal, intending to give a preference to a pre-existing creditor," "such conveyance shall be void, provided the creditor had reasonable cause to believe such debtor was insolvent."—*Law Reporter, March, 1846, p. 500.*

To such a statute, the argument of the defendants' solicitors would apply. But not the words in the statute last quoted, so pregnant with the ideas of knowledge, intention, and preference, expressions omitted in our statute? It was un-

doubtedly in the power of the legislature to have passed the law in this form. But have they done so?

The solicitors for the defendant contend that in order to bring a conveyance within the act, it must be made "with intent and motive to give a fraudulent preference."

If such had indeed been the intention of the legislature, they legislated to no purpose; for the case was already provided for at common law, and by statute 13 *Eliz.* ch. 5.—*Schley's Dig.* 215.

A mortgage given on personal property, executed with intent to defraud creditors, is vitiated by the fraud, though executed for a valuable consideration, or to secure an honest debt.—*Law Reporter*, March, 1846, p. 504.

The statute itself evidently goes further. The title of the act speaks "of the injury and exclusion of creditors." The preamble states "excluding or defrauding." The body of the act speaks of "exclusion" of creditors only, and declares such exclusion sufficient to make the deed legally "fraudulent," without reference to intention; nor does the word "fraud" occur in any part of the body of the act, except in this last peculiar application.

But in addition to this argument upon the law itself, we present the opinions of eminent judges upon this point.

Judges Johnson and Cuyler, in the case of *Schultz vs. Briethaupt*, before referred to, in deciding a cause identical in its features with this, say, in speaking of a mortgage:

"It is a transfer of real estate, by which other creditors may be excluded from an equal share of the estate so assigned." And it is a "conveyance, not free from a trust, for the benefit both of the seller and other persons appointed by him."—*Printed Report*, p. 61.

They follow the words of the statute, and attach to the deed only those requisites attached by the statute. They make no mention of preference, intention and fraud. They sat as judges, not as givers of the law. They decided as the statute stood before them. They did not legislate.

Judge Nott, delivering the opinion of the Court of Equity Appeals in South Carolina, says:

"The manifest object of the act throughout, is to prevent a debtor who is unable to pay his debts, from making any transfer of his property to one or more of his creditors, in exclusion of the rest, and to effect an equal distribution among all his creditors."—*Printed Decision*, p. 3.

Is not an unintentional act of exclusion as much within the statute as one which is intentional? The statute draws no distinctions.

If the act can be evaded by apportioning out the property among a few favored creditors, by way of mortgage, to the exclusion of the rest, I think the State of Georgia has legislated in vain upon the subject. I do not put it on the ground of fraud, but on the positive provisions of the act; the policy of which is too plain to be mistaken.

Johnson, Chancellor, delivering the opinion of the Court of Appeals in South Carolina, says:

"I am disposed to concede that, upon a strict construction of the statute, if, at the time of the assignment or transfer, the debtor was in truth unable to pay all his debts, the assignment or transfer would be void, although the fact was unknown, both to the debtor and the assignee or transferee."—1 *Spear's Eq. Reports*, p. 559.

In the absence of controlling authority, it is respectfully submitted, that these, the opinions of some of the ablest judges who have ever presided in the Southern States, should have great weight with the court, in deciding this, to them a question it is believed of first impression, and without one contrariant opinion.

It is excepted, also, to the judge's decision, that he allowed the jury to find the mortgage void, although the mortgagor was wound up by executions twelve months after the date of the mortgage.

To this, it may be briefly answered, that the act does not require a person

wound up before his transfer shall become void, but only requires insolvency, which the presiding judge charged.

And, more conclusively, although he was wound up by executions one year afterwards, yet the writs upon which those executions were founded, were issued and served upon the mortgagor, prior to the time of his making the mortgage, as will appear, by reference to the record accompanying the exceptions.

It was contended, that the mortgage, came within the proviso, being a deed free from a trust.

Judge Johnson, in the decision above quoted, says that it is not free from a trust.

The doctrine of mortgages, from the beginning, was a doctrine of trust; and almost the whole of the earliest equity-jurisdiction, with regard to mortgages, was based upon this notion.

We trust we have shown, that the statute of this State, allowing a different method of foreclosure, has not altered the substance, as it has not altered the form of this conveyance.

But the proviso speaks of *bona fide* absolute sales. What is meant by this? Clearly, a sale for cash, or consideration then moving, and which consideration stands to the creditors, in the place of the property thus sold?

Can it be said, that a mortgage or deed, by a man in insolvent circumstances, to a creditor, for an antecedent debt, by which other creditors are excluded, comes within the proviso?

If so, the proviso is directly repugnant to the body of the act, and is void.—
1 *Black. Commen.* p. 89.

In all the cases above quoted, the proviso seems to have been construed, as having relation to purchasers other than creditors, and for a present consideration; and would apply where a person, for a valuable consideration, sold his property to any one not a creditor, and still, in such conveyance, limited a trust for himself or others.

The facts of the insolvency of the grantor, and exclusion of creditors, make the conveyance one of *mala fides*, and exclude it from the proviso.

And this latter reasoning applies, even though the court should be inclined to the opinion, that a mortgage is not a deed which involves a trust.

The fourth and last ground of error, is upon the charge of the court to the jury, as to the consideration for which the mortgage was given, under the following state of facts:

In January, 1836, the trustees, defendants, sold to Edward Stiles a tract of land, called Selina, for eight hundred dollars, taking his promissory notes for that sum, secured by a mortgage on the place. Selina was at the time worth eight hundred dollars, but shown, by the testimony, to have deteriorated in value very much in the six years following. In April, 1836, Edward Stiles exchanged Selina with one Stephens; and sold the place taken in exchange to Starr, in the same month, for \$800; and in that month, April, 1836, received the purchase-money from Starr. There was some proof of a promise, from Stiles to Stephens, to relieve the Selina place from the mortgage; but not with the knowledge, or concurrence, of the trustees.

In April, 1842, Edward Stiles being insolvent, and the amount due on the promissory notes having increased from \$800 to 1200 by the interest, and Selina having deteriorated in value from \$800 to \$500, Edward Stiles gave to the trustees a mortgage on nine negro slaves, to secure the principal sum, and all the interest then due, being an amount one and a half times larger than the sum originally secured, and double the value of the Selina property.

It is stated in the answers, that upon receiving the second mortgage, the trustees cancelled the mortgage they held upon Selina, which had been the property of Stephens, for upwards of six years previously, though upon the face of the mortgage no such consideration appeared.

The judge charged, that though the last mortgage was good for the eight hundred dollars, which was the value of the Selina place exchanged, yet, inasmuch as it was given to secure not only that, but also four hundred dollars

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interest which had accrued, which was over and above the value of the land and mortgage released; it was, as to the four hundred dollars, without consideration, and void; and being a statutory deed void in part, it was void altogether.

The only error in the charge of the court, we contend, was that it did not instruct the jury that as between Edward Stiles and the trustees there was no consideration whatsoever then moving.

The mortgage on its face expressed an antecedent consideration, and, being the act and deed of the parties under seal, it was an estoppel to them to show any other consideration than the one expressed.

When a deed states a consideration, and does not say for other consideration, no other consideration can be shown.—4 Cowen, 427; 7 Johns. Rep. 341; 1 Vesey, sr. 127.

If no proof can be heard to show a different consideration for a deed than the one expressed upon its face, the consideration was wholly antecedent, and the judge's charge upon the point greatly in favor of the defendants.

But further, the release of the mortgage accrued to the benefit of Stephens, not Stiles. The Selina tract had belonged to Stephens for six years; it was his land, not the land of Stiles, which would have been sold, had the mortgage been foreclosed. *There was no evidence before the court that the exchange was accompanied with a warranty of title, and the parol promise of Stiles was such an one as could not be enforced against him in equity, because of the statute of frauds, nor at law, because of the statute of limitation.* It is true, as a general rule, that there is an implied warranty in exchanges, but such was not the case in this instance, because Stephens knew of the mortgage; and the parol promise of Stiles, to lift the mortgage, took the place of a warranty. The warranty in exchange is, that if any party is evicted, he has a right to the land given in exchange for his own. This would have restored Stephens' land to him, and there is no evidence that Stiles gave Starr a warranty title.

There was no release to Stiles of any legal obligation, and the release of a moral obligation is not a valuable consideration in law.

If the deed of exchange contained a warranty, it was in the power of the solicitors for the defendant to have produced it. Stephens was examined as a witness by them, and their neglect to prove so material a point indicates with certainty that it has no existence.

The reason why a deed is not within the act which is made for a present valuable consideration is, that the consideration stands to the creditors in the place of the property transferred.

"The money is probably applied to the debts of the creditors, or the debts of some of them."—Schultz and Briethaupt, printed Doc. p. 61.

Was there any such consideration as this in the case before us. The defendant's witness, Starr, proved that he had paid to Edward Stiles the consideration money for the land taken in exchange in the year 1836. The money was in Stiles' pocket, and probably spent by him long before the debts of the complainants were contracted. It was to Stiles a consideration long past, and a present consideration to Stephens only.

But allow the mortgage to be good for the \$800 principal, it is assuredly bad for the \$400 accrued interest.

The case of Schultz and Briethaupt, before quoted, is directly in point.

The McKinnes' owed the Bank of the State of Georgia \$40,000, and, in consideration of a mortgage to be given to secure both sums, the bank advanced in cash to them, \$50,000. The mortgage was taken to secure both sums, and the Sixth Circuit Court in the District of Georgia, and the Court of Appeals of South Carolina, decide that, so far as the mortgage was for antecedent consideration, it was void, notwithstanding the then moving consideration of \$50,000.—Printed Decision, pp 3, 61.

Suppose, in the most favorable point of view, that they had paid Stiles \$800 in cash, and he had appropriated it to the payment of the complainant's

ors, and that in consideration of the \$800, he had given them a mortgage for \$1200, it would under the above decision be void as to the four hundred.

How much stronger is this case against the defendants? They have a lien upon certain property, (admit it to be Stiles' for argument sake,) worth six hundred dollars, and in consideration of a release of this lien, he gives them a mortgage conveyance for \$1200 00. Can it be seriously contended that such release is a full moving present consideration for the \$1200 00?

Such a decision is a virtual repeal of the law.

A debtor in insolvent circumstances goes to a creditor to whom he owes five thousand dollars, and which creditor has in his possession property of the debtor subject to his retainer of \$500 00. The debtor says, release this property, and I will give you a mortgage to secure your antecedent debt of \$5000. The property is released, and the mortgage given. Will it be contended that such a release will support the mortgage, and be that valuable moving consideration which the law contemplates? Surely not; and yet, if \$500 will not support \$5000, neither will \$600 support \$1200. The principle is identical. The court cannot judge of the relative considerations: there is but one rule which we apprehend can be sustained, either by policy or sound reason.

"That when a mortgage is given for valuable consideration, the moving to secure a debt which is antecedent, that the mortgage is void for the exact amount by which the antecedent debt exceeds the present consideration."

This mortgage was therefore void as to the interest; and, being a statutory deed, void in part, was void altogether.—*Schultz and Briethaupt vs. Bk. State of Geo. 8 Johns. 253; 2 T. R. 139, 603; 5 Taunton, 746; 8 T. R. 641; 43 Law L. 285; 1 Sand. 66, n.; Hobart, 14; Chitty on Con. 228-9; 1 Bowell on Con. 199; 1 Comyns on Con. 26; Buller's N. P. 172; xliii Law L. 285, 33; 9 Law L. 70; 2 Kent, 536; Fonblanque Eq. 205, n.; 1 Wheaton S. N. P. 555, 8; 15 Pick. 167; 6 Hill, 438; 1 Brock, 184; 13 Wend. 53; 1 Hopkins' Ch. 405.*

This point was conceded by counsel for defendants at the time of trial, but seems to have been revived in their exceptions.

Statement of the debts and assets of Stiles, 19th April, 1843.

N. B. Knapp & Co. \$115 with int. and costs, . . .	\$141 48
C. C. Thompson \$49, with int. and costs, . . .	69 50
James A. Clifford \$209, with int. and costs, . . .	235 66
Joseph Jones, Charles West and Roswell King, jr., \$799 95, with int. from Jan., 1836, . . .	1208 48
Benj. Stiles \$675, int. on \$300, . . .	788 00
G. W. Anderson and Brother \$1474 26 with int. . .	1611 00
Tuller, Moore & Co. \$400, with int.	508 30
Price & Mallery to \$130, with int.	140 00
L. N. Falligant \$376 36, with int.	481 00
Benj. Stiles ex'ion from Laurens, ...	450 00
Needham McLendon \$210, with int. and costs, . . .	250 00
Nathaniel Gay \$84, int. and costs, ...	111 60
John Smith \$152 50, int. and costs, ...	171 40
Benjamin Stiles, guardian, \$808 97, ...	808 97
John B. Gaudry \$67 37, ...	67 37
J. B. Gaudry and J. E. Gaudry, survivors	37 68
	\$7077 44

Assets as per return.

One tract of land, 166 acres, in Bryan county, . . .	\$800
15 negro slaves, ...	
9 of the mortgaged slaves sold for	1700
3, included in the other mortgage, sold for	600
3, allowing \$200 round, ...	600
	\$3700
is in the world	\$3377 44

WM. LAW, for the plaintiffs in error, in conclusion.

Defendant, Stiles, obtained an advance from complainants, his factors, in 1840, and gave a mortgage on Crow-lane plantation. He had before purchased Selina plantation from the other defendants in the bill, trustees of Mrs. Joseph Stiles and children, for \$800, and mortgaged the place to secure the purchase-money.

Crow-lane was proved to be worth, in 1840, about \$2,000—the amount of the advance.

In 1836, defendant, Stiles, exchanged Selina for Moonshine plantation : which he sold for \$800.

Mr. Joseph C. Stiles (the husband and father of *cestui que trusts*) agreed to have the mortgage cancelled upon receiving a new security. He was then in Kentucky. Upon his arrival here in the spring of 1842, this arrangement was consummated, by giving new mortgage, and was acquiesced in by the trustees.

Defendant, Stiles, was then greatly indebted, and numerous suits a few days before instituted against him. His debts were then about \$7,000. His property consisted of about fifteen negroes (mortgaged, as aforesaid, to the trustees, and to B. E. Stiles, guardian, &c.,) and Crow-lane plantation. The complainants having exhausted their mortgage on Crow-lane, seek to avoid the defendant's mortgage, as contrary to the act of 1818.

First inquiry : Is a mortgage within that act ?

That act turns upon the creation of a *trust*. This appears from the causes which led to its passage ; and is expressly declared in the act, (3 *Dall.* 267,) a man may sell, *provided no trust*.

What is a mortgage ? It is a sale—conditional, it is true, but absolute on forfeiture of condition.—4 *McCord*, 336. What is the condition ? That mortgagee pay the debt. But it is said to be a *trust* estate. What kind of a trust ? Such an one as is contemplated by the act ? No ; it is an equity of redemption—the right of paying the debt, and retaining his property. This equity is at all times open to his creditors. They may redeem. They may levy upon it. These assignments in trust delay and hinder creditors.—2 *Kent*, 535.

Take the case of a general assignment for payment of creditors. A provision for the overplus, after payment of debts, to the assignor, will not invalidate, because such a resulting trust would follow of course, without any stipulation.—2 *Kent*, 536, *n*.

So an absolute conveyance, intended as a security, is but a mortgage, and the equity of redemption would result without any stipulation. There is in neither case any secret trust, and the interest reserved by the mortgage is only what the law gives from the character and nature of the transaction.

What is prohibited ? Assignments and conveyances in trust, by which the title passes absolutely out of the grantor, for the benefit of those appointed in the deed. These conveyances were peculiarly objectionable, because debtors were enabled to force creditors into conditions under the penalty of being excluded. *The distinction is very striking*.

I have been considering this subject in the most favorable aspects to complainant's case. But under our law, what is a mortgage but a mere security for a debt ?—*Judge Schley's Decision*, p. 76.

We have seen in England the estate becomes absolute in mortgagee, upon condition broken. Not so with us. The mortgagor remains the owner until, by judgment of a court, the property is sold. This is expressly provided by statutes in New York and South Carolina.—2 *Paige*, 592 ; *River Eq. Rep.* 383. How, then, shall a mortgage be called a conveyance under the statute, seeing it does not change the ownership, but is a mere security.

2d. But if a mortgage is embraced in our act, then we say—

1st. That at common-law, a man might prefer any creditor ; he might give an assignment or mortgage to secure an antecedent debt, of *any part*, or the *whole* of his property, so there was no fraud ; and he might do this the very night he absconded.

2d. He might do the same thing under 13 *Eliz.* if *bona fide* and on good consideration.

3d. Under bankrupt laws, he might secure a particular creditor for *past* or *future* debts; unless by *deed*, in *contemplation of bankruptcy*, or of *all*. In these cases, the law made it an act of bankruptcy.

Let us look for a moment at the *statute of Elizabeth* to prevent voluntary conveyances in fraud of creditors. The questions have been the *bona fides* of the transaction.

Badges of fraud—

1st. Continuing possession.

2d. Care of entire estate. From these and the like, secret *trusts* are implied. Mere indebtedness is not enough. There must be fraud.—1 *Story*, 356, 360; *New. on Con.* 384-5.

Let us look at bankrupt acts: (1 *Jas.* 1, and 21 *Jas.* 1,) A trader may prefer, if not of all, or under apprehension of impending bankruptcy.—*New.* 282. Indebted means insolvent.—*Id.* Reason why all won't do under latter acts, and good under *Eliz.* if no fraud.—*New.* 381; *Doug.* 92.

The construction of our act cannot be extended beyond bankrupt acts. They seek

1st. Equality;

2d. Distribution by law;

3d. Protection of bankrupt from future liability.

Ours seek only equality. Indebted, in our act, means insolvency.—*New.* 384-5. What is technical insolvency?—1 *Peters*, 438-9. When, then, is a mortgage embraced under our act? By an *insolvent*, in *contemplation of impending ruin*, on the *eve* of bankruptcy, with the intent to give a fraudulent preference. And further, it must be voluntary.—*Doug.* 88, 92; 1 *Wash. Cir. C. Rep.* 34-5. If the creditor pushes, the fraudulent *intent* is negatived. Let us test these principles by the facts of this case.

If the defendants had taken no mortgage for Selina, they would have had a lien for unpaid purchase-money: But they had a mortgage. They gave a good present consideration for the new mortgage. \$800 went to Stiles' creditors. We are in a court of equity.—1 *Story*, 522; 20 *John.* 637; 4 *Paige*, 508. Specific lien always preferred to general.—*Story* 402-3, n. 1; 3 *Diss.* 74; 1 *Paige*, 130; 2 *ib.* 590, 266. A court of equity may displace a judgment, where an equitable claim against the premises.

Who has the superior equity?

But where the equities are equal, the maxim is, *qui priori est in tempore, potior est in jure*.—*Story*, 400.

By the Court—WARNER, Judge.

The complainants in the court below filed their bill for the purpose of setting aside a mortgage executed by Edward Stiles to Joseph Jones, Charles West, and Roswell King, jun., trustees of Caroline Clifford Stiles, on the ground that the said mortgage was fraudulent, within the provisions of the act of 19th December, 1818, as against creditors. The complainants are judgment creditors of Edward Stiles; their judgment having been obtained *subsequent* to the date of the mortgage. On the trial of the cause, the defendants in the court below, offered to introduce Benjamin Edward Stiles as a witness, who was objected to, on the ground that he was security for the defendants on their appeal bond, and therefore interested. The defendants' solicitors then moved the court to permit them to substitute another security on the bond, in the place of the witness, which motion the presiding judge refused: Whereupon the defendants excepted. We are of the opinion that the court below ought

to have permitted the defendants to have substituted another security in the place of the witness, for the advancement of justice ; the motion for substitution being made by the parties for their benefit, they could not take advantage of it ; and an order entered on the minutes of the court, stating the facts, would make the record sufficiently intelligible. It would not, as is supposed, be giving a *new bond* ; the appeal was entered according to law, and security given at the time, who continues security up to the time the new security is substituted in his place. Nothing is more common in our courts, when the original security on an appeal bond becomes insolvent, pending the appeal, than to require new security to be given ; the court passing an order for that purpose. The motion to substitute another security in the place of the witness ought, in our judgment, to have been allowed ; and there was error on the part of the court in overruling the motion. In the case of *Eastman and Philbrick vs. McAlpin*, decided during the present term, (page 157,) we held that a debtor, in insolvent circumstances, might make an absolute *bona fide* conveyance of his property to a creditor, in payment of a *bona fide* pre-existing debt ; provided there was no trust reserved for the benefit of the seller, without such conveyance being obnoxious to the act of 1818. But it has been ably and ingeniously argued, in this case, that inasmuch as the mortgagee is a trustee for the mortgagor, to the extent of the equity of redemption, such a trust is created, as would bring a mortgage conveyance within the statute. That a mortgage is such a conveyance, as would be obnoxious to the provisions of the act of 1818, provided it was used as an instrument of fraud, for the purpose of securing to the mortgagor a *secret* trust, or benefit, within the intent and meaning of that act, we do not doubt ; but that a mortgage executed by a debtor in insolvent circumstances to a creditor, to secure the payment of a *bona fide* pre-existing debt is *per se* fraudulent as against creditors, within the meaning of the act of 1818, we do not admit. We have already decided that the debtor can make an *absolute* sale of his property to a creditor, in payment of a *bona fide* pre-existing debt. If he can make an absolute sale, surely he can pledge it, or create a lien upon it, as a *security* for a pre-existing debt.

A mortgage in this State is nothing more than a *security* for the payment of the debt ; and the title to the mortgaged property remains in the mortgagor until foreclosure and sale, in the manner pointed out by statute. It is true, the mortgagor is entitled to the equity of redemption after the debt is paid ; and the clause in this mortgage which stipulates that the surplus, after paying the principal debts, interests and costs, shall be refunded to the mortgagor, confers no other, or greater privilege than the law confers upon him. The law gives him the right to the surplus of the proceeds of the mortgaged property when sold, after foreclosure, over and above the principal debt and interest, which the mortgage was given to secure, and the costs of such foreclosure and sale.

We have said, under our law, the *legal title* to the mortgaged property remained in the mortgagor until after foreclosure and sale. The judgment creditor, in this case, could have levied his execution upon the mortgaged property, and sold it, and the purchaser would have acquired the legal title, subject to the incumbrance of the mortgage. The fundamental error in the argument of the counsel for the judgment creditor

is, in supposing the legal title to the mortgaged property is in the mortgagee after condition broken, and that he holds it in trust for the mortgagor; at least so far as the equity of redemption is concerned. The fact that the legal title to the mortgaged property remains in the mortgagor, until after foreclosure and sale, cuts off, and destroys all foundation for the idea there is any such trust existing between the mortgagee and mortgagor as was contemplated by the act of 1818. The record in this case discloses that in 1836, the plaintiffs in error took a mortgage on a tract of land called Selina, to secure the payment of a debt due by Edward Stiles, the mortgagor, for \$800 00. At the time this mortgage was executed, it is admitted the mortgagor was *solvent*. Afterwards, this tract of land was sold by Edward Stiles to Stephens, and for the purpose of raising the incumbrance, so as to make Stephens a good title, a new mortgage was executed in 1842, on the negroes, to secure the payment of the \$800 00 with the accruing interest thereon. When this last mortgage was executed, the mortgagor was in failing circumstances. The debt which the mortgage was executed to secure, it is admitted, was a *bona fide* indebtedness. The court below instructed the jury, this latter mortgage, given to secure the payment of the \$800 00 with the accruing interest thereon, was within the statute of 1818, so far as the interest was concerned; and being void in part, it was void altogether. We are of the opinion a debtor in insolvent circumstances, has the right to execute a mortgage to a creditor, to secure the payment of a *bona fide* pre-existing debt; and that the execution of such mortgage would not *per se* be fraudulent as against creditors, within the intent and meaning of the act of 1818. That act was directed against conveyances made by debtors to creditors, in trust for the benefit of the seller, or mortgagor, whether secret or otherwise; but was not intended to prohibit a debtor from making a *bona fide* sale of his property to a creditor, or to secure the payment of a *bona fide* debt by mortgage on his property, free from any trust for the benefit of the seller or mortgagor. Under our law of mortgage, there is not such a trust existing between the mortgagee and mortgagor, as will *per se* bring it within the provisions of the act. We are, therefore, of the opinion, there was error in the charge of the court, in deciding this mortgage came within the provisions of the act of 1818. Let the judgment of the court below be reversed, and a new trial granted.

No. 25.—AMOS SCUDDER, plaintiff in error, vs. WYLLY WOODBRIDGE, defendant in error.

The doctrine that the principal is not liable to one agent or employee for damages occasioned by the negligence or misconduct of another agent or employee, is not applicable to slaves.

This was an action on the case, brought by the defendant in error against the plaintiff in error, in the Superior Court of Chatham county, and was tried in said Superior Court before Judge Fleming, at May Term, 1846.

For the facts of the case, and the error assigned, see the opinion of the court, (*supra*.)

MULFORD MARSH, for the plaintiff in error.

The action in the court below (Chatham Superior Court) was brought by defendant in error, to recover the value of a negro boy, a carpenter, who was accidentally killed on board the steamer *Ivanhoe*, owned by the plaintiff in error. The boy was at work on board, and the action is sought to be sustained on the ground of carelessness on the part of the captain of the *Ivanhoe*, who was in the employ of the plaintiff in error, and that the plaintiff is responsible to every one, as well those in his employ as to third persons, for the carelessness of his agents.

The Superior Court so instructed the jury, and upon that point the case is brought before the court.

The error assigned is that the instruction of the court was wrong, and that the plaintiff in error is not liable for any carelessness of his agents to those in his employ.

Counsel for plaintiff in error makes the following point: That a master is liable for the carelessness of his agent only to third persons, and not to those in his employ.—1 *Blk. Com.* 429.

Blackstone lays down the rule how *strangers* may be affected by the relation of master and servant. *Strangers* to the master, not *those in his employ*—they are not *strangers*. And on page 431, he says: "If a servant by his negligence does damage to a *stranger*, the master shall answer for his neglect." This rule is founded upon an implied contract, that extends to strangers only—not those in the master's employ—as fully laid down by Justice Story.—*Story on Agency*, sec. 452, 453, 4 and 5.

This rule is clearly recognized in the case of *Murray vs. So. Car. Railroad*, by the Supreme Court of South Carolina—1 *McMullan's Rep.* 385.

The plaintiff was in the employ of the defendant, and sued for damages occasioned by the negligence of another servant of the defendant. The court held that the rule of liability extended only to strangers, and that plaintiff could not recover—he not standing in the situation of a stranger to defendant, being in his employ.

In the Supreme Court of Massachusetts, in the case of *Farwell vs. Boston and Worcester Railroad Companies*, (4 *Met.* 49,) the court held the same doctrine.

That was an action brought by one in defendant's employ, to recover damages for injuries occasioned by the negligence of another servant of the defendant, and the court held the defendant not liable, and reorganized the case in South Carolina as sound law. This last case was in 1842.

And the Supreme Court of New York, in 1844, confirm the same doctrine in the case of *Brown vs. Maxwell*.—6 *Hill Rep.* 592.

These are all the American cases we find upon the point. In *England*

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same doctrine was held in the case of *Priestly vs. Fowler*.—3 *Mees. & Welsb.*—Note in *Story on Agency*, 565.

Not one case do we find like the present, where the master has been held liable for the negligence of his agent. And in this case no negligence has been proven on the part of the plaintiff's agent, save that of the defendant's own boy, who was killed. He was told not to go into the wheel-house; and again, to come out of it. He did wrong in going into a place of danger, and then not coming out when ordered.

If the doctrine contended for by the defendant's counsel be the law, it would, in the language of some of the judges, lead to alarming consequences, and put an end to the existence of masters and servants.

But make him liable to each for the negligence of each, and you will put an end to their employment. No reasonable and responsible man would take the risk.

Suppose a master carpenter, with one hundred men in his employ, responsible for their negligence to all the world, other than those in his employ, is a heavy liability. He could not trust one or more of them to build a scaffold, or do any work, lest by their neglect some of his other workmen should get injured. Nor could he trust a portion on the scaffold, lest they, by negligence, drop a piece of timber or some article, whereby another of his workmen should be injured. It may be justly asked, what rule of law makes him thus liable? It is not in their contract of hiring, nor is it implied from their contract.

And so of every other employment. A stage owner, for instance, is liable to passengers for the gentleness of his horses, the strength of his carriage, &c. But apply the rule contended for by defendant's counsel, and where will it end? Suppose the driver is injured by the breaking down of the stage, the inquiry would lead to the workmanship of the carriage-maker and the blacksmith, and all concerned in making the carriage. The inquiry would be almost endless, and quite absurd.

It is therefore very clear, that the court erred in instructing the jury, and that the plaintiff in error is not liable, and the judgment of the court below should be set aside.

ROBERT M. CHARLTON, for defendant in error.

It is said that the usual rule, that a man shall be liable for the acts of his agents, does not apply to this case, because a master is not liable to his servant for the negligent act of another servant in his employ, when they are both engaged in one common undertaking. And three cases are cited to support this position: *Murray vs. R. R. Company*, 1 *McMullan*, 385; *Farwell vs. Boston & Worcester Railroad Co.* 4 *Metcalf*, 49; *Brown vs. Maxwell*, 6 *Hill*, 594.

I propose to show that these cases do not apply to the present case.

And 1st. They do not apply, because it is not denied in these cases (at least in the first two) that a case may not occur where the owner will be liable for the acts of one agent to another; as in such cases as where the owner employs unfit and improper persons as agents, by whose ignorance or folly another is injured—1 *McMullan*, 401; 4 *Metcalf*, 61-62.

Now, this is exactly the view we took of this case to the jury: that the defendant had employed a mason for his captain; a black man for his engineer, and that he had not other hands on board sufficient and skillful for such a purpose; and that the injury was occasioned by the want of competent and skillful persons. The charge of the court was, that if a person did not employ proper persons to control or navigate his boat, he would be responsible for injuries accruing thereupon; and the jury—the question of fact being left to them—found the negligence in appointing to exist. We are therefore not in conflict with the decision in 1 *McMullan*, and 4 *Metcalf*, because of this distinction.

The case in 6 *Hill* does not apply at all, because the point in that case was, that the plaintiff was equally to blame with the other agent, and therefore he could not

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recover. No such point was made in this case; no exception was taken to this point. Beardsley, J., expressly says, in reference to the main principle, "It is not necessary to place the present decision on that principle;" therefore, what he said was mere *obiter dictum*, and not the decision of the court, nor involved in the case.

But, secondly, the cases in *McMullan* and *Metcalf* are not applicable, because they proceed upon the idea, that in cases of this kind, each agent is an observer of the conduct of the others, can give notice of the misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take the necessary precautions, and employ proper agents. And that public policy will be best promoted by taking away the remedy against the employer, and making each agent act as the spy upon the others.—1 *Metcalf*, 59; see *Blanding's argument*, 1 *McMullan*, 395.

But we must see that these cases apply to free agents and white men, and not to slaves; their position in our section of the country would not allow them to direct or interfere; complain they dare not, and leave they cannot.

The general rule stated in *McMullan* and *Metcalf* may be correct, and yet we must see that the exceptions, in justice and reason, must be numerous.

Even the court in *Metcalf* admits, that there may be implied warranties arising out of the operation of master and servant.—See p. 62.

Surely justice requires that every man who employs another in an inferior capacity, does impliedly covenant and contract that the superior agents employed to superintend him, shall be skillful and prudent persons. Every man who holds himself out in a public or any other capacity, thereby impliedly asserts, that he is capable, and will manage properly such business. Such a warranty is implied from the mere fact of holding himself out in such capacity.

The inferior agent cannot control him in the choice of his agents; the inferior not being employed as a skillful person may not be enabled or expected to know whether the superior agent is conducting himself with skill and care, for relying on the implied warranty of the common employer; and without skill or knowledge to detect the coming evil, his first admonition may be a broken leg: shall he not recover?

3d. But the main objection to the application of these cases to the present is, that these were cases of injury to the *person*; this is a case of injury to the *property*.

No one can doubt, if I hire my servant to another, he is bound to take ordinary care of him, and he is responsible if he does not take such care, by employing incompetent agents to superintend the common employment. It is a case of bailment.

A slave, it is very properly said, is not a bale of goods: but still he is property; and so far from the fact that he is a human being, as well as property, diminishing the amount of care which the bailee is bound to use towards him, that circumstance increases it, for the sake of policy and humanity.

Evans, J., impliedly admits this distinction when he says: (1 *McMullan*, 399.) No man would have any guaranty for the security of his *property*, if his only remedy for negligence was the irresponsible or insolvent agents which another might employ. This shows that the decision he was making, would have varied, if property or bailment had been the question before him.

And O'Neal, J., in dissenting from the majority says: "If the plaintiff, instead of himself, had hired his negro man to the defendants, as second fireman, and he had lost his leg by the carelessness of the engineer, would not the defendants have been liable? It seems to me that they would, or one section of the law of bailments would be repealed by the court of errors.—1 *McMullan*, 404.

Chancellor J. Johnson also speaks in the same manner, exemplifying by the case of an overseer.—See *ib.* p. 407-8. He also asks if we are to look to the irresponsible persons, *perhaps slaves*, hired by the company thus, when the injury occurred?

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Now, apply these questions to the case before us. The jury have found the fact submitted to them, that the death of this slave was occasioned by the acts of defendant's servants; one of them an irresponsible person—a slave. Are we to be insulted by being told to resort to a remedy against the black fireman! who is not responsible, *civiliter*, and ought not to be responsible, when placed, perhaps against his will, in a position which he has no science to fill?

Even if the cases in *McMullan* and *Metcalf* are sound law, will this court apply them to a case expressly excepted by the very decisions, and in a case, too, involving property, and the question of bailment?

The plaintiffs in error may say, that we did not hire this slave to him; that it is not a case of bailment. We say so also. We did not hire this slave to him; he was acting without our consent, and taking our property out of the county without our consent; and being thus a wrong-doer, he is liable for all the consequences of his illegal act. And if it be so—if this slave was not in his employ by the consent of the owner—how do the cases of *McMullan* and *Metcalf* apply? He cannot in such event be called an agent of Scudder.

But if our property was hired to him, (in which can only the cases he cites be applicable,) then, it was a case of bailment, and he is responsible to us for want of care in employing competent persons.

By the Court.—LUMPKIN, Judge.

Wylly Woodbridge brought an action on the case against Amos Scudder, to recover the value of a negro boy, by the name of Ned, a carpenter, killed on board the *Ivanhoe*, owned by the defendant. It was alleged in the declaration that the property was lost by the carelessness and mismanagement of the captain of the boat, who was employed by the owner. This boy had been hired as a carpenter to make the trip from Savannah to St. Mary's, and becoming entangled in the water-wheel, in aiding to get the boat off, he was drowned. Judge Fleming, before whom the cause was tried in Chatham county, charged the jury, that if they found that the death of the slave was occasioned by the negligence or want of skill in the officers of the *Ivanhoe*, in the employment of Amos Scudder, that he was liable for the loss accruing from such negligence or want of skill. The jury returned a verdict for five hundred dollars. The defendant below excepted to the charge of the court, and now assigns for error that the instruction to the jury was wrong, and that the plaintiff in error is not liable for any carelessness of his agents to those in his employ.

The verdict of the jury having established the fact that the death of the slave was produced by the negligence or want of skill of the officers on board the boat, I shall not pretend to scrutinize the testimony, but address myself at once to the inquiry, whether, conceding the fact as found by the verdict, Scudder is liable to Woodbridge? This question is new in our State, and well deserves the gravest consideration.

The general doctrine, as contended for by counsel for plaintiff in error, may be correct. It is distinctly laid down in *Story on Agency*, and other elementary writers, and fully sustained by the adjudications adduced from South Carolina, Massachusetts, New York and England.—1 *McMullan Rep.* 385; 4 *Met.* 49; 6 *Hill Rep.* 592; *Priestly vs. Fowler*, 3 *Mees. and Welsb.* And we are disposed to recognize and adopt it, with the cautions, limitations and restrictions in those cases. But interest to the owner and humanity to the slave, forbid its application to any other than *free agents*. Indeed, it cannot be extended to slaves, *ex necessitate rei*.

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The argument upon which the decisions referred to mainly rest is, that public policy requires that each person engaged on steamboats and railroads should see that every other person employed in the same service does his duty with the utmost care and vigilance; that every hand is qualified for his place, and that everything connected with the line is in good order. Moreover, it is urged, that the want of recourse on the principal will not only make each agent more careful himself, but induce him to stimulate others to like diligence. Can any of these considerations apply to slaves? *They dare not interfere with the business of others. They would be instantly chastised for their impertinence. It is true that the owner, or employer, of a slave is restrained by the Penal Code from inflicting on him cruel, unnecessary and excessive punishment; and that all others are forbidden to beat, whip or wound them, without sufficient cause or provocation.* But can any one doubt that if this unfortunate boy, although shipped as a carpenter, had been ordered by the captain to perform the perilous service in which he lost his life, and he had refused or remonstrated, that he would have received prompt correction? and that on the trial on a bill of indictment for a misdemeanor, his conduct would have been deemed a sufficient justification for the supposed offence? No! slaves dare not intermeddle with those around, embarked in the same enterprise with themselves. Neither can they testify against their misconduct. Neither can they exercise the salutary discretion, left to free white agents, of quitting the employment when matters are mismanaged, or portend evil. Whether engaged as carpenters, bricklayers or blacksmiths—as ferry-men, wagoners, patroons or private hands, in boats or vessels in the coasting or river navigation, on railroads, or any other avocation—they have nothing to do but silently serve out their appointed time, and take their lot in the mean while in submitting to whatever risks and dangers are incident to the employment. Bound to fidelity themselves, they do not, and cannot act as securities, either for the care or competency of others. And what can the master know of the condition of the vessel, road, work or machinery, where his servant is employed, or of the skill or prudence of the persons associated with him? No two conditions can be more different than these two classes of agents: namely, slaves and free white citizens; and it would be strange and extraordinary indeed if the same principle should apply to both.

Again: a large portion of the employees at the South are either slaves or free persons of color, wholly irresponsible, *civiliiter*, for their neglect or malfeasance. The engineer on the *Ivanhoe* was a colored man. Had the accident been attributable to his mismanagement, to whom should Woodbridge have looked for redress? But we think it needless to multiply reasons upon a point so palpable. There is one view alone which would be conclusive with the court. *The restriction of this rule is indispensable to the welfare of the slave.* In almost every occupation, requiring combined effort, the employer necessarily intrusts it to a variety of agents. Many of those are destitute of principle, and bankrupt in fortune. Once let it be promulgated that the owner of negroes hired to the numerous navigation, railroad, mining and manufacturing companies which dot the whole country, and are rapidly increasing—I repeat, that for any injury done to this species of property, let it be understood and settled that the employer is not liable, but that the owner must look for compensation to the

servant who occasioned the mischief, and I hesitate not to affirm, that the life of no *hired* slave would be safe. As it is, the guards thrown around this class of our population are sufficiently few and feeble. We are altogether disinclined to lessen their number or weaken their force. We are, therefore, cordially, confidently and unanimously agreed, and so adjudge, that the judgment below be affirmed, with costs.



No. 26.—JAMES P. DENT, plaintiff in error, *vs.* KING & COOMES, use of HIRAM KING, defendants in error.

Where a plaintiff in an action *ex contractu* recovers judgment against several defendants, and one of them pay the whole demand, the law gives him an action for money paid against the others for contribution.

Defendants standing in *aquali jure*, are bound to contribute. This doctrine, however, does not apply to judgments against several in actions of tort.

A judgment is the highest evidence of the defendant's joint indebtedness; but not conclusive of the right of the one having paid it, to receive contribution. It is not conclusive that the defendants are in *aquali jure*; it is only *prima facie* evidence of that right, and of that position.

The principle of contribution is equality in bearing a common burden, which may depend upon the circumstances and relations of the parties anterior to the judgment against them.

A new trial will not be granted, because the jury, by a committee of one or more of their body, communicated with the judge, relative to the cause with which they were charged, *publicly*, in *open court*, and *in the presence of the parties or their attorneys*. The publicity of the communication guards it from all objection, as well as all impropriety.

This was an action of *indebitatus assumpsit*, brought by the defendants in error against the plaintiff in error, in the Inferior Court of the County of Chatham, to recover \$350, for so much money paid by them for his use—being a suit for contribution. The plaintiff in error by his attorneys pleaded the general issue, and also a plea of set off. The defendants in error recovered in the Inferior Court, from which an appeal was taken, and at May Term, 1846, of the Superior Court of the County of Chatham, the case was tried on the appeal, before Judge Fleming and by a special jury.

The facts of this case, as they transpired on the appeal trial in the court below, together with the matters of error alleged, having been fully stated in the opinion of the Supreme Court, delivered by His Honor Judge Nisbet, (for which see *supra*,) it is deemed unnecessary to state them here.

R. M. CHARLTON, submitted the following brief of Messrs. WARD & OWEN, Attorneys of Record for the plaintiff in error:

We shall contend, in the first place, that a claim or demand, by one surety at another, for contribution, is a claim or demand purely of equitable origin: neither sought to be enforced by an action at law, or bill in equity, its char-

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acter is the same, and is open to every legal as well as equitable defence which exists between the parties; and that, consequently, his Honor the judge in the court below erred, in instructing the jury that the facts and circumstances, in evidence before them, constituting that defence to the present action, could not be taken into consideration by them in deciding upon the merits.

In support of this ground of error, we shall rely upon the following authorities:—1 *Story's Equity*, 471 to 478, sec. 498; *Coulon vs. Green and Lovett*, 2 *Caines' Rep.* 152; 2 *Starkie on Evidence*, 98, 99, 100, 102, note; 2 *Greenleaf on Evidence*, 90, 91, sec. 113, 114; *Act of December 21, 1820*; *Prince's Dig.* 447; *Wright vs. Butler*, 6 *Wend. Rep.* 284.

2d. We shall contend that, as between the parties to the present action in the court below, the judgment which was recovered in the Inferior Court for the county of Chatham, in favor of Henry F. Willink, against both the defendants and plaintiff in error, (a copy of which is incorporated in the bill of exceptions, and which said judgment recovered was offered in evidence, on the trial of this cause in the court below, by the said defendants in error,) however conclusive that judgment may have been, as between the original parties thereto, on all questions in issue, and decided by it; still, as between the parties to the present action, it is but *prima facie* evidence, and no more, of an indebtedness, on the part of the plaintiff in error, to the said defendants in error, for a moiety of said judgment, subject to be rebutted and controlled, by every legal and equitable defence existing between them; and that, consequently, there is error in the charge of his Honor the judge of the court below, to the jury, that said judgment, recovered as aforesaid, and in evidence before them, was conclusive of the rights of the plaintiff in error, and the defence which he had set up to the present action; and that unless they were satisfied, from the testimony, that the plaintiff in error had either paid the one-half of said judgment, or had paid the same into the hands of the defendants in error at the time they paid the said judgment, that they, the defendants in error, were clearly entitled to recover.

In support of this ground of error, we shall rely on the following authorities:—1 *Starkie on Evidence*, 198, sec. 64, 24, 215; 1 *Greenleaf on Evidence*, sec. 523, 524, 527, 528, 529, 530, 538, 539.

3d. We shall contend that there was error in law, in the charge of his Honor the judge of the court below, to the special jury who tried this cause, inasmuch as his Honor charged them, that the defendants in error, being the agents of the stockholders of the steamboat Charles Downing, and having, subsequently to the contract entered into by them and the plaintiff in error to Willink, received, as such agents, the sum of nearly five thousand dollars, from which sum they had promised Willink his debt should be paid, and having appropriated that sum, with the exception of six hundred and dollars, to the payment and liquidation of other demands against the said boat, and in part payment of a claim or demand due to them individually, acted within the scope of their authority, as the agents of the said plaintiff in error, notwithstanding the express agreement and understanding between them, at the time they entered into the contract to Willink, that they would pay him the amount due, for the repairs of said boat, from the first moneys they might subsequently receive, from the earnings of said boat, as such agents.

4th. We shall contend that his Honor the judge of the court below, in permitting one or more of the special jury to leave their jury-room, after having been charged with the case, and permitting them to propound questions to the court, for its answer, touching the legal and equitable rights of the parties, and answering the same, not in the presence of the whole jury, is erroneous, and dangerous in practice, and calculated to lead to great mischief and injury.—*Sergeant vs Roberts et al.*, 1 *Pickering's Rep.* 337.

W. LAW, for F. S. BARTOW, attorney of record for the defendants in error.

By the Court—NISBET, Judge.

The firm of King and Coombs, the defendants in error, and James P. Dent, the plaintiff, were interested, as part owners of the steamer Charles Downing. There were also a number of owners besides. King and Coombs were the agents of the company owning the steamer. She, requiring repairs, one Willink was employed to repair her; and having received a part of his pay, detained the boat for the balance. In this state of the case, King and Coombs and James P. Dent agreed in writing to pay the amount due Willink. A part of this balance being paid, Willink sued King and Coombs and Dent, upon their agreement, and obtained judgment against them. King and Coombs, having paid the judgment, brought suit against Dent for his moiety of the debt. Upon the trial, plaintiffs read in evidence the judgment, and proved payment of it by themselves. The defendant introduced a witness, (Willink,) who proved that King and Coombs and Dent were part owners of the steamer; that King and Coombs were the agents of the company, and at the time that they and Dent assumed the payment of his debt, "they promised witness, and such was the distinct understanding at the time, that they would pay witness \$500 on the arrival of the boat at St. Augustine, and the balance from the first earnings of the boat." It was further in evidence for the defendant, that only a part of the \$500 was paid, and that Willink was not paid out of the first earnings of the boat. Under this state of facts, the defendant claimed that he was not liable to contribution, because Willink was not paid from the first earnings of the boat, in pursuance of the understanding. The judge of the court below charged the jury, that the record of the judgment against plaintiff and defendant was the highest evidence of their joint indebtedness to Willink; and that the agreement of Dent and King and Coombs with Willink, that he should be paid out of a particular fund, could not affect the case, as the application of the fund to the payment of other debts of the parties was a violation of the contract with Willink, and as much the act of Dent as of King and Coombs—King and Coombs being his agents. Upon the opinion of the court upon these two points, the errors are assigned. After the jury had been charged with the case, and had retired to their room, one of their body came into court, in two several instances, and made inquiry of the court, it being then in session, as to points involved in the cause. The plaintiff in error also claims the right of having a re-hearing, upon the alleged improper intercourse between the court and jury, after the cause had been committed to them. This court are of opinion that there is no error in the charge of the court below, as to either of the points stated; and farther, that the communication complained of between the court and jury, after the latter had been charged with the cause, and had retired, is no good ground for a new trial.

There can be no doubt, but that the judgment in favor of Willink against King and Coombs and Dent, is the highest evidence of a joint indebtedness from them to him; and to this extent, and no farther, does the decision of the court below go.

The record proves this with absolute verity, and cannot be gainsayed as to that fact. The judgment gives the plaintiff a right of collecting his of each and all of the defendants.

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If a plaintiff in an action *ex contractu* recover judgment against several defendants, and one pay the whole demand, the law gives him an action for money paid against the others for contribution. Defendants, standing in *aquali jure*, are bound to contribute. This doctrine, however, does not apply to judgments against several, in an action of *tort*.—*Chitty on Contracts*, 180; 1 *Camp.* 343, 345; 2 *Camp.* 452; 2 *John's. Ch. Rep.* 131; 1 *Randolph*, 38.

A right of action therefore exists in favor of King and Coombs against their co-defendant Dent. And although we hold that the judgment is the highest evidence of a joint indebtedness from the defendants to the plaintiff, we do not hold, that the judgment is conclusive evidence of the right of one having paid it, to receive contribution: it is not conclusive that the defendants are *inaquali jure*; it is only *prima facie* evidence of that right and of that position. The principle of contribution is equality in bearing a common burden; and this equality may depend upon the circumstances and relations of the parties, anterior to the judgment. Hence, we believe the court did well to admit evidence of the transaction between King and Coombs and Dent, and Willink, at the time the former assumed the debt to the latter. We think the court too was right in its judgment of the effect of the testimony, in relieving against the presumption of liability to contribution raised by the judgment against Dent.

We hold that the testimony does not rebut the presumption thus raised. How far a distinct contract between King and Coombs, and Dent, the former being agents of the company owning the steamer, to the effect that the debt to Willink should be paid out of the first earnings of the boat; and a violation of that contract, on their part, would go to relieve Dent from liability to contribute, it is not necessary for us to determine, inasmuch as no such contract is proven. All in relation to this matter, that is proven, is a promise and understanding between King and Coombs and Dent, of the one part, (to use the language of the indenture,) and Willink, of the other part, that \$500 of the debt should be paid when the boat arrived at St. Augustine, and the remainder out of the first earnings of the boat. This understanding was broken, it is true; but not alone by King and Coombs, but also by Dent. By Dent, in two points of view: First, by him, because he was in fact a party making the promise to Willink, as well as King and Coombs, and it was his duty to see to it, as well as they, that the promise was fulfilled; and, second, by him, because King and Coombs, being agents for the company owning the boat, and he being a member of that company, their act, in violating the understanding, was his act. The act of the agent is the act of the principal. The testimony, therefore, was correctly ruled not to affect the case in the court below.

It is the policy of the law to maintain the trial by jury pure, and hence the decisions have gone a great way in granting new trials for misconduct on the part of the jury. And for the same reason, as well as to keep the respective offices of the court and jury distinct, and hold the jury aloof from all chances of undue influence from the court; all intercourse between the court and jury, in the recess of the court, and without the knowledge and approbation of parties or their attorneys, has been discouraged.

The case relied upon by the counsel for the plaintiff in error was determined upon these principles. There a new trial was granted because

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the judge wrote a note to the jury about the case, with which they had been charged, after the court had adjourned.—1 *Pick* 337.

The facts of the case before us do not bring it within the principle of the case in 1 *Pick*. Here we find no improper conduct on the part of either the court or the jury. Nothing is more common, and, in our judgment, more proper, than for the jury, by a committee of one or more of their body, to communicate with the judge, relative to the cause, in open court, and in the presence of the parties or their attorneys and the world. The publicity of the communication guards it from all objection, as well as all impropriety.

Let the judgment of the court below be affirmed.

No. 27.—GEORGE S. CAMERON & Co. vs. AMOS SCUDDER.

This was a claim case, tried before Judge Fleming, in Chatham Superior Court, May Term, 1846. A distress warrant for rent, issued at the instance of the defendant in error, against one Charles E. Mustin, was levied upon sundry articles of merchandize, which were claimed by the plaintiffs in error. Upon the trial, it appeared in evidence that the defendant in execution, Mustin, rented the store which he occupied in Savannah, from the plaintiff in execution, Scudder, and owed him a balance for rent of \$210 83, for which the distress warrant issued. It further appeared in evidence, that the defendant in execution, Mustin, was accustomed to deal with and obtain goods for his store, from the claimants, Cameron & Co., merchants in Charleston, S. Carolina. The claimants held the promissory notes of the defendant in execution; that on the 20th of October, 1845, the defendant in execution sold to the claimants, by a written bill of sale and invoice, the goods thereto annexed, which were proved and given in evidence—the goods and articles in said invoice mentioned, being all the goods in his store. The consideration for the sale was the delivery up by the claimants of the promissory notes aforesaid of the defendant in execution, amounting to \$100, or thereabouts, more than the value of the goods sold, as inventoried and invoiced in the schedule annexed to the bill of sale.

It was proved that the articles, levied on and claimed, were contained in the schedule attached to the bill of sale. It was further proved that the defendant had no other property, except a horse and wagon, and some other small matters, which the witness, Blackwood, said were also sold to the claimants, and that he attested a bill of sale for them, but none was adduced.

It was further proved that the defendant in execution, at the time of the sale, was considered insolvent. The store and goods in it were delivered at the time of the sale to the agents of the claimants, and by their orders the goods and articles were subsequently sold at auction by an auctioneer.

Upon this state of facts, the judge below charged the jury, that if they found the defendant in execution was insolvent at the time of said sale, that the consideration paid for the goods by the claimants was an amount debt due by the defendant to claimants, then, that said sale, how-

ever absolute, was not *bona fide*, within the meaning of those terms in the statute of 1818 of Georgia; that such sale was in violation of that act, and could not be sustained, because it would be a preference of one creditor to another, which the act was intended to prevent.

The jury, under the charge of the court, found the property subject.

Whereupon the counsel for the plaintiffs in error, who were the claimants in the court below, excepted to the charge of the court, upon the ground that the sale, being absolute upon its face, accompanied with delivery of possession, and no secret trust proved, was *bona fide* under the act of 1818, and that the absolute payment of an antecedent debt is a good consideration, to support a *bona fide* sale, by an insolvent under the provisions of said act.

WM. LAW, for plaintiffs in error.

MULFORD MARSH, for defendant in error.

Per CURIAM.

This case comes fully within the principles of the cases of *Eastman and Philbrick vs. McAlpin*; and of *John E. Davis and others vs. George W. Anderson and Brother*, decided at the present term of this court. For the reasons given in those cases, to which the learned reader is referred, it is considered and adjudged, that there was error in the charge of the court below, that a *bona fide* sale by an insolvent debtor, to a creditor for a pre-existing debt, is void under the act of 1818. Let a new trial be awarded.

No. 28.—WILLIAM H. STILES vs. MOSES EASTMAN, SHELDON C. DUNNING, and HENRY D. WEED.

Several judgments are rendered against the endorsers of the same note; the two last, by agreement with the plaintiffs, take an assignment of the judgment against the first, and as a consideration therefor, they pay the plaintiffs the amount due upon the judgments against themselves, which are entered satisfied. Held, that the judgment so assigned is not extinguished by the satisfaction of the judgments against the two last endorsers, and that they may under such assignment proceed with the *fi. fa.* against the first endorser, and by levy and sale reimburse and remunerate themselves the amount paid out by them; it appearing that they were not interested in the consideration of the contract on which the endorsed note was given.

The control of an execution against the maker and prior endorsers, as provided for by the act of 1839, should be obtained under an order of the court from whence the execution issued, upon the showing required by that act, in which it is not necessary to show that the payment by the subsequent endorser was forced by levy; it may be voluntary, and yet, in the eye of the law, it is a payment under the compulsion of legal process.

Accommodation endorsers are not liable to contribution as securities, either by the common law or under the provisions of the act of 1826.

This was a bill in equity, tried before Judge Fleming, in the Superior Court of the county of Chatham, May Term, 1846.

The facts of the case, and the errors assigned in the court below, being fully set forth in the opinion of the Supreme Court, are omitted here.

L. S. D'Lron, for plaintiff in error.

Maintained that under the statutes of Georgia endorsers are securities, and equally liable for contribution when the principal fails or is insolvent.

By the act of 1826^(a) (*Prin. Dig.* 462) the endorser of a promissory note is held, taken and considered as a security to the same, and in all respects bound as a security. This statute, therefore, changes the common law in reference to endorsers, and does away with the necessity of demand and notice, so as to bind the endorser, considering him as a security.

The act of 1840,^(a) (*Pamphlet Laws*, 172, 173,) entitled "An Act for the relief of Securities," makes them liable for a proportionable part of the debt and no more. In its proviso, it declares that all shall be equally liable. This statute seems to contemplate an equitable liability.

If, then, endorsers in Georgia are regarded as securities, where they are not interested in the consideration of the note, then Mr. Stiles could be only liable for one-third of the debt, being the part or portion equitably due by him.—*Bayley on Bills*, 150, note.

But if the counsel for the plaintiff in error shall be mistaken in this view of the liability of accommodation endorsers in Georgia, then he maintains: *Secondly*—That the payment and satisfaction of the judgments against two of the endorsers of the note, viz: Eastman and Dunning, was an extinguishment of the judgment against Stiles, which would only render him liable to contribute equally with the other endorsers, without regard to his ultimate liability to them.—1 *Bayley Rep.* 140.

The subsequent assignment of the judgment against Stiles would not restore its validity, there being satisfaction entered for the same demand.—1 *Bayley Rep.* 427, and case there cited.

Upon the payment by Dunning and Eastman of the judgments against them on the same note, the Savannah Insurance and Trust Company was satisfied their debt, and had nothing to assign. They could assign no more than they had; they

(a) "An Act to define the liability of endorsers of promissory notes, and other instruments, and to place them upon the same footing with securities."—*Approved Dec.* 26, 1826.

"Sec. 1. From and after the passage of this act, that the practice heretofore required, of making a demand of the makers of promissory notes and other instruments, for the payment and performance of the same, and their giving notice of such demand, within a reasonable time, to the endorser of said promissory notes and other instruments, shall cease and become entirely unnecessary to bind said endorsers; and where any person whatever endorses a promissory note or other instrument, he shall be held, taken, and considered as security to the same, and be in all respects bound as security, until said promissory note or other instrument is paid off and discharged, and shall be liable to be sued in the same manner and in the same action with the principal or maker of said promissory notes or other instruments; any law, practice, or usage to the contrary notwithstanding: Provided, always, that nothing herein contained, shall extend to any promissory note which shall be given for the purpose of negotiation, or intended to be negotiated at any chartered bank, or which may be deposited in any chartered bank for collection; and provided, also, that nothing contained in this act shall be so construed as to prevent the endorser from defining his liability in the endorsement."—*Dawson's Compilation*, 76.

(b) "An Act for the relief of securities."—*Approved Dec.* 22, 1840.—(*Pam. Laws*, 172, 173.)

"Whereas, great inconvenience arises, and often great injustice done to individuals being parties in execution, under the existing law as co-securities—for the fact, that whereas one security (as the case may be,) having been compelled under execution, to pay the debt or obligation of his principal, is not allowed to control or collect by said execution, each security's proportionable part of said execution so paid, but must proceed by an action at law:

Sec. 1. For remedy whereof, be it enacted, &c., That from and immediately after the passage of this act, any security (who may be sued together with other securities)

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have placed the assignees in their stead in regard to Mr. Stiles, and they have assigned to them an extinguished and satisfied judgment.

But Mr. Stiles has paid up one-third of the judgment, and the cost in the three cases, and the assignees can have no remedy against him, even by action of assumpsit, for money paid, laid out and expended.

This would have been their only remedy, if Stiles had contributed nothing towards the payment of the judgment, the execution was satisfied, and the assignment could not give it vitality.

Upon the payment by the assignees of the entire judgment, they could only have become simple contract creditors of their co-endorser.

3d. The counsel for the plaintiff in error further maintained, that the court below erred in charging the jury that the act of 1839^(c) embraced this case, and the assignment rendered the execution good and valid against the said William H. Stiles

The statute does not apply :

1st. Because the evidence does not prove that Eastman and Dunning were compelled to pay the said judgment, but the payment was voluntary.

2d. Because the defendants in error only paid off a part of the judgment, and never paid any part of the costs.

3d. Because the act contemplates a payment to the sheriff, where no assignment is necessary.

4th. Because the defendants in error, claim to control the said assignment, by act of the plaintiff in execution, and not under the provisions of said act.

WM. LAW, for the defendants in error.

The principal question argued in this case was, whether an accommodation endorser was liable to contribution as a co-surety.

shall pay or discharge any execution or executions, issued against principal or co-securities, shall, after an entry is made on the said executions by the collecting officer, that the same has been well and truly paid by said security, then and in such cases, the said security so paying or discharging said execution against each co-security who may have been made a party to said suit, for the proportionable part equitably due by each, and no more. Provided, nevertheless, that all should be equally responsible; if not, then to be equally divided or paid by those who are.

"Sec. 2. That any execution so paid or satisfied by two or more securities, shall be held as the joint property of said securities against all the parties equally concerned, for their proportionable part.

"Sec. 3. That after payment and entry made, as herein prescribed, it shall be the duty of the officer making the entry, to deliver the said execution to the security who shall have made the payment, to be used and controlled as herein mentioned."

(c) "An Act to provide a remedy for endorsers against all prior endorsers, and the makers of promissory notes and other contracts, in certain cases therein mentioned."—*Approved Dec. 21, 1839.*—*See Pamphlet of Acts, 58.*

"Sec. 1. That from and immediately after the passage of this act, it shall and may be lawful for all persons who shall hereafter become endorsers on any promissory note, bond, or other contract, made on the face thereof payable at any chartered bank, or which shall be negotiated at any chartered bank, or deposited there for collection, and where said endorsers are not interested in the consideration thereof, and judgment has been rendered against them, and execution has been issued thereon accordingly, and where such endorser or endorsers shall hereafter be compelled to pay off such judgments or executions, he, she, or they shall be entitled to the full control of each and every judgment or execution that shall or may be founded upon the same instrument as against the makers thereof, and all prior endorsers thereon, for the purpose of reimbursing and remunerating him, her, or themselves, out of the property of said maker and endorsers: Provided, the person applying for such control shall make it appear to the court from which the execution issued, that he was only endorser thereon, and not interested in the consideration of said contract, and that he has *bona fide* paid off and discharged the judgment or execution that has been rendered or issued against him, and all costs on the other judgments."

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The following decisions, it would seem, ought to settle this point.—*Bayley on Bills*, 151; 9 *Pick.* 8, 547; 3 *Peters*, 470; 4 *Rand.* 553; 7 *Johns. Rep.* 361.

2d. If the general principle be so, still it is contended, that the law of Georgia of 1826, makes all endorsers securities, and, therefore, that they are liable to contribution.

Our first reply is, that they are only to be taken, held, and considered as securities, so far as to dispense with demand and notice. The object of the act was to increase, and render more certain and easy their liability, and not to mitigate it.

But the decisive answer is, that this case is within the proviso of the act; it was a bank note.—*See Prince*, 462.

The act of 1840, as to co-sureties, is relied on; but that act applies only to those who are equally liable.

It is very clear that the act of 1826 did not make endorsers securities, as to their liability, because, in 1839 the legislature passed an act, providing a remedy for endorsers, against all prior endorsers, &c.

This brings us to the consideration of the last points in this case, viz: that the satisfaction of the execution against Eastman and Dunning, was a satisfaction of the judgment against Stiles.

I might content myself by saying, that the act of 1839 furnishes a decisive answer to this objection.

That act expressly provides, that when a note is payable on its face at bank, or was intended to be discounted at a bank, or lodged there for collection, an endorser, paying it, might use the judgment to make the money out of any prior party.

But let us examine the cases referred to.

1 *Bail.* 140. The principle affirmed in this case is, that a levy is satisfaction, unless shown to be unproductive. A. having two distinct judgments against two for the same debt, levies and applies the money raised to a junior judgment; he afterwards levied on the other defendants. Ruled, that the first levy satisfied the debt, as he could have payment but once for the same debt, the other judgment was extinguished.

With this case I do not quarrel.

1 *Bail.* 437. *Judgment vs. maker and endorser.* Endorser pays; subsequently he procures an assignment of the judgment vs. maker. Ruled, that the judgment having been extinguished by the previous payment, there was nothing to assign. But suppose the assignment had been made at the time of payment, and in consideration of it? It would have been a purchase of it by the endorser. The judgment against him would have been extinguished; but surely not that against maker.

I have three answers to give to these cases.

1st. It was the agreement at the time that the assignment should be made; and it was made. It was not designed that the judgments should be satisfied. 3 *McCord*, 2. *Bail.* 15.

2d. No satisfaction entered by the Trust Company could affect the assignee after the assignment.

3d. The statute of 1839.

By the Court—Nisbet, Judge.

The facts in this case are as follows: William A. Howard, having occasion to raise money, made his promissory note, payable at any chartered bank in the city of Savannah, and procured the endorsement thereon of the plaintiff in error Wm. H. Stiles. The banks, declining to discount the note without other endorsers, the endorsement of Moses Eastman and S. C. Dunning was procured. With these endorsers, it was discounted, and at maturity protested. The owners of the note, the

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Savannah Insurance and Trust Company, instituted suits severally against the endorsers, the maker being insolvent, and obtained a judgment against each of them. Stiles paid a part of the debt. Eastman and Dunning, by Mr. H. D. Weed, who advanced the money, paid the whole of the debt remaining due, under an agreement that the plaintiffs, to wit: the Savannah Insurance and Trust Company, would assign to them the judgment against Stiles. It was assigned to Mr. Weed by the Savannah Insurance and Trust Co., for the use of Messrs. Eastman and Dunning; and on the same day satisfaction was entered on the judgments against them, by the plaintiffs' attorney, in the office of the Clerk of the Inferior Court. The assignees of the judgment against Stiles, threatening to levy upon his property, he filed a bill enjoining it, and calling upon them to account, as securities liable to contribute; alleging the facts herein stated; also, that he, Stiles, had paid his proportion of the debt, and that there was an agreement between the endorsers that they should equally share the loss, if compelled to pay the note. This last allegation was not proven on trial.

Upon the trial, the court was asked to charge the jury, by plaintiffs' counsel:

1st. That endorsers, under the statutes of Georgia, upon promissory notes, endorsing for accomodation only, are mere securities, and equally liable to contribution.

2d. That the payment and satisfaction of the judgments against Eastman and Dunning, as endorsers on the note, was an extinguishment of the judgment against the first endorser, Stiles, which would only make him liable to contribution; and having paid his part, the whole debt was satisfied as to him.

Which charges the court below declined to give; but, on the contrary, did charge the jury, that under the act of 1839, Eastman and Dunning, subsequent endorsers, having paid the judgment against themselves, and taken an assignment of the judgment against Stiles, the first endorser, and having shown to the court that they were not interested in the consideration of the debt, that judgment was valid, and they had the right to use and enforce the same to reimburse themselves.

Upon the two points upon which the court declined to charge, and upon the charge which the court did give, the errors in this cause are assigned.

The first point for our consideration is, whether, according to the facts in this case, the endorsers, under the act of 1826, occupy the position of securities, and are liable to contribution? The act of 1826, (*Prin. Dig.* 426) by its terms, does not extend to "promissory notes which shall be given for the purpose of negotiation, or intended to be negotiated at any chartered bank, or which may be deposited in any chartered bank for collection;" all such promissory notes are expressly exempted from the operation of the act in the proviso.

Now, as the note upon which these judgments are founded, is upon its face made payable at "any of the incorporated banks of the city of Savannah," and was in fact deposited in a bank for collection, we believe that the act of 1826 has no application whatever to it. It is one of that class of notes excepted from the operation of the act by the terms of the proviso. If it was not, we do not believe that the act of 1826 re-

the common law, as to the liability of endorsers. That act, in our opinion, does not make endorsers liable to contribution as securities, but leaves their liability as it found it at common law. They are still liable, as endorsers, and the effect of the act of 1826, in its application only to notes not given "for the purpose of negotiation, or intended to be negotiated at any chartered bank, or which may be deposited in any chartered bank for collection," is, to relieve the holders of such notes from the necessity of demand and notice, in order to charge the endorsers, and to make them liable to be sued, "in the same manner and in the same action with the principal or maker." It is, therefore, the judgment of this court, that the court below did not err in declining to charge upon this point, according to the request of the counsel for the plaintiffs.

Had the satisfaction of the judgments against Eastman and Dunning been entered before the assignment to them of the judgment against Stiles, *bona fide*, the judgment against Stiles would have been extinguished, and the assignment could not have revived it. In that event, there would have been nothing to assign; both the debt, and the process for collecting it, would have been extinguished. It is true, as argued by the learned counsel for the plaintiffs, that a plaintiff having judgment against several for the same debt, can have but one satisfaction. Payment to him of one, discharges all, except as to the costs. And in the case before us, the plaintiff in these judgments, the Insurance and Trust Company of Savannah, being paid, *as to them*, the judgments are all satisfied; they can never have another satisfaction. But how stand the facts of this case? Eastman and Dunning, being subsequent endorsers, purchase of the plaintiffs their judgment against Stiles, the first endorser, and take an assignment of it to Mr. Weed, for their use. This a stranger could do. Why not they? A part of the agreement of purchase is, that the judgments against themselves shall be entered satisfied, and accordingly, in pursuance of the understanding, they are so entered, and this is done, not before the assignment, but the same day, and must therefore be considered contemporary with it. Without any agreement that satisfaction should be entered upon them, they would have been satisfied by the fact of payment. Such an understanding was unnecessary. The result is, that as purchasers, they are entitled to control the judgments against Stiles; and that, although extinguished, so far as the plaintiffs are concerned, it is yet vital, so far as their assignees are concerned.

To the mind of this court, this case is within the provisions of the act of December, 1839, (*Hotchkiss*, 546.) That act provides that endorsers upon "any promissory note, bond, or other contract, made on the face thereof payable at any chartered bank, or which shall be negotiated at any chartered bank, or deposited there for collection, and where said endorsers are not interested in the consideration thereof, a judgment has been rendered against them, and execution has been issued thereon accordingly; and when such endorser or endorsers shall hereafter be compelled to pay off such judgments or executions, he, she, or they shall be entitled to the full control of each and every judgment and execution, that shall or may be founded upon the same instrument, as against the makers thereof, and all prior endorsers thereon, for the purpose of reimbursing and liberating him, her, or themselves, out of said maker and endorsers. And, the person applying for such control shall make it appear to

the court from whence the execution issued, that he was only endorser thereon, and not interested in the consideration of said contract, and that he has *bona fide* paid off and discharged the judgment or execution that has been rendered or issued against him, and all costs on the other judgments."

Now, the record shows that these judgments are founded upon a *promissory note*; that the note, on the face thereof, was made *payable at a chartered bank*—was *negotiated at a bank*; that Eastman and Dunning were endorsers upon the note, and Stiles the first endorser; that they were *not interested in the consideration*; that *judgment had been rendered against them, and execution issued*; and that they had *paid off said judgment and execution bona fide*. All the requirements of the act appear to be fulfilled in the facts of this case. It is just the case contemplated by the act. The counsel for plaintiff in error argues that this case is not within the act, because the payment by Eastman and Dunning was *voluntary*, and the act contemplates a *compulsory* payment. What is payment by compulsion? A payment to the sheriff after sale under the hammer? We think a levy and sale is not necessary to create a legal compulsion; but that the parties may, in the meaning of the act, be considered as *compelled to pay* when their liability is fixed by judgment, and execution has issued thereon. The constraint required is not in fact, but in law.

It is farther urged by the counsel that Eastman and Dunning paid only a part of the judgment, and therefore the case is not within the act. They paid all that was owing; a part having been paid by Stiles. Their right of control against him is limited to the amount due on the judgment at the time of the assignment. If, in a case where nothing is paid, the endorser is entitled, upon payment of the whole, to control the judgment against his prior endorser for the whole; he certainly, upon a parity of reasoning, in a case where only a part is owing, and he pays that part, is entitled to control the judgment against his prior endorser *pro tanto*.

Were the endorsers seeking rights in and through a judgment against their prior endorser, in a court of law, we should hold that they should first exhibit an order of the court from whence the execution issued, giving them the control of it. That would seem to be the highest evidence that they are entitled to the benefits of the act of 1839. But as the parties were in a court of equity, we are of opinion that there, all the benefits of that act could be, upon the hearing, extended to the endorsers, without such previous order. We cannot see, under all these views of the subject, that the court erred in declining to charge as requested on the second point; or in charging, as he did charge, as to the construction of the act of 1839.

It is claimed by the counsel for the plaintiff in error, that the act of 1839 intends to give its privileges to endorsers that are liable to each other as such at common law; that accommodation endorsers, at common law, are upon the footing of securities, and liable to contribute; that Eastman, Dunning and Stiles were, in this case, accommodation endorsers for Howard, the maker of the note; and therefore liable to contribution. In the first place, it is true, according to the record, that there was no contract or agreement between these endorsers as to their liability to each other, other than that which is made by their endorsement of the note. And it is also true, in the second place, that they endorsed for the

accommodation of the maker—neither receiving any value. The note was made by Howard, and endorsed by Stiles; and, so endorsed, taken to the bank to be discounted for the benefit of the maker, and declined by the bank; the endorsement of Eastman and Dunning being afterwards procured on the same note, it was again taken to the bank, and discounted; the money raised thereon being paid to the maker. So that these are accommodation endorsers, and the question is fairly made: Are such endorsers, at common law, bound to contribute, or are they liable as endorsers having received value? We believe they are liable as endorsers who have received value, and that the law of contribution does not apply to them. This question has frequently come under the review of the courts, and we consider it as settled. The argument in favor of the position taken by the counsel for the plaintiff in error is, that no consideration passed from the first endorser to the second, or from the second to the third, or from the third to the holder; that, according to the facts, they are securities for the maker; and neither being interested in the consideration, all ought equally to share the loss; that they are *in aquali jure*.

In the regular course of business, and according to the law of endorsed notes and bills, any subsequent endorser, who takes up a paper, can go back upon all prior endorsers, as well as the maker, for indemnification. The first endorser undertakes that the maker shall pay the note, or that he, if due diligence be used, will pay it for him; and this undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who is compelled to pay it. This is the regular course where endorsements are for value; and applies to all endorsers in their order, no matter how numerous; each undertaking upon the credit of all the names which stand before his own. In the case before us, Stiles put his name upon the paper alone, upon the faith of the maker; and assumed, thereby, a separate and sole liability. Afterwards the other endorsers assumed their separate liability, upon the faith of his liability, as well as that of the maker: the act of endorsement is not even simultaneous, but separate and consecutive. If this note had remained in the hands of one of the subsequent endorsers, he paying for it no value, it may be conceded that he could not recover against Stiles; there is, in that event, no consideration passing between any of the parties to support such a recovery; or if one of the subsequent endorsers should transfer such a paper for value, and should be compelled to take it up, he could not, in that event, come back upon the first endorser. But neither of these contingencies has, in this case, happened. The note, as endorsed, is taken to the bank by the maker, and discounted for his benefit. The maker passes the note to the bank for value, and the liability of all the endorsers to the bank is the same as if they had received the value. A consideration is paid by the holder—the bank—on the credit of all the endorsers, last as well as first; and though paid to another, it is not the less a good and valid consideration. The liability of the last endorser is, on this consideration, perfect to the bank; and the liability of the previous endorsers, to him is, because of his liability to the bank, also perfect. The second and third endorsers have, in this case, taken up the debt, and paid value to the holder in virtue of their liability, created by their endorsement. If their liability is founded equally on the credit of Stiles, the first endorser, and the maker—if their undertaking, on the

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credit of both, has subjected them to loss—how can the contract between them and the first endorser be said to be without consideration? It is not without consideration. Such is the reasoning upon which this doctrine is founded; and it seems to be well sustained, both by reason and authority.—See *Bayley on Bills*, 151, n.; 9 *Pick.* 547; 3 *Peters' S. C. R.* 470; 4 *Rand.* 553; 18 *Martin*, 517; 3 *Harris & Johns.* 125; 7 *Johns.* 361.

The judgment of the court below must be affirmed upon all the points made in the bill of exceptions.

No. 29.—THOMAS SEALY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Indictment for Murder.

A writ of error will not be sustained, even under the statute organizing the Supreme Court, on account of the court below refusing to grant a continuance in a cause, unless it is a most plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested in them by the law.

The practice in England, upon the construction of the act of 33d *Edward* 1, of *passing* jurymen, in criminal cases, until the whole panel is exhausted, and a jury not made, before the crown can be called upon to show cause, is not authorized in this State, since the adoption of the Penal Code.

In order to impeach a witness, by showing that he has made contradictory statements, it is not necessary that he absolutely deny the declarations imputed to him. It may be done when he says he does not recollect if the subject matter of these conversations be relative to the issue.

Witnesses who testify as to what they saw respecting a transaction after night, and by star-light, aided by lamps upon the surrounding buildings, cannot be impeached by persons who propose to prove that they have made experiments on other nights between the same hours, and with the same degree of light, and were unable to discern objects accurately.

The plaintiff in error was convicted of murder, before Judge Alexander, in the Superior Court of the county of Talbot, at March Term, 1846.

Upon the arraignment, and the issue joined, the prisoner being unable, on account of his poverty, to employ counsel, Hines Holt, Henry L. Benning, Allen F. Owen, and William Elam, Esqrs., were assigned by the court as counsel to appear for and defend him on his trial.

The counsel for the prisoner being called upon to announce whether he was ready for trial, moved for a continuance, and in support of their motion submitted an affidavit of the prisoner, setting forth that he was not ready to come to trial at that term; that William Hammock was a material witness for him, and was absent without his consent or procurement; that he had not been subpoenaed, because he was confined in jail, and his presence, therefore, expected; that the showing was not made for delay, &c.; that he expected to prove by Hammock that he saw the difficulty in which the deceased (Chambles) was said to have been killed; that the deceased was pursuing the person who gave him the blow, and who said he did not intend to go any further; that deceased came up with hi

grabbed at him, when Hammock saw the blow given; that he expected, further, to prove by Hammock, that himself (the prisoner) and the deceased had been in company together during the evening of the day on which the deceased was killed, and that up to the time of the killing they had been perfectly friendly, without any previous difficulty, or cause of difficulty, between them. The motion for continuance being objected to on the part of the State, was overruled by the court below, and the counsel for the prisoner excepted. It appeared that Hammock had broken jail on the night preceding the term of the court.

The court below then ordered on the said issue to be tried, and caused to come a panel of forty-eight men as jurors. The array was then put upon the prisoner in the usual form; and there being no objection to the array, the court below caused the panel to be again called, one by one, in the order in which their names appeared upon the *venire facias*, and as numbered therein, commencing at number *one*, and continuing on to the name of Pulaski Posey, the seventh juror, who, on being called, was set down by the counsel for the State, until the remainder of the panel should be gone through with, and found insufficient to make a jury of twelve; it being claimed on the part of the State, that the State might by law pass by a juror, as a right, in addition to, and over and above, the ten peremptory challenges allowed by the Penal Code; and these last challenges were in no respect affected by such passing by of jurors. To all which the counsel for the prisoner objected. Whereupon the court below decided that the State might thus pass by the juror, Posey, until the remainder of the panel should be perused, without affecting her right to the ten challenges allowed by the code in such cases. The counsel for the prisoner excepted. The juror, Posey, was passed by, and the calling of the panel resumed. In the course of empanelling a jury, the counsel for the State, under the decision of the court, passed by divers other jurors, as in the case of the juror, Posey. A jury having been empanelled, divers witnesses were introduced, and sworn, on the part of the State, and amongst them William Miller, a lad thirteen years of age, who, after testifying at considerable length in behalf of the State, was asked, upon the cross-examination, by prisoner's counsel, whether he did not say to William Wynn and Fleming Freeman, or one of them, at Page's grocery, in Talbotton, since his examination before the committing magistrates in the case against the prisoner for the alleged murder, that the prisoner told the deceased, just before the stabbing, "I have run from you twice, and I shall not do it longer," whereupon the deceased grabbed at him, (prisoner,) and said, "I will cut your d——d windpipe?" and, in answer to said question, the witness, Miller, replied that he did not recollect having any such conversation with any one, and thought that he had never had any conversation with William Wynn about the matter at Page's store, or anywhere else. William Wynn was introduced, on behalf of the prisoner, with a view to discredit the witness Miller; and, after being sworn, was asked if William Miller had not at the time and place specified, and before Fleming Freeman and himself, made the representation referred to in the question put to him, Miller? The witness was stopped by the solicitor-general, and objected by the court below, upon the ground that his testimony did not contradict Miller, whose denial was not positive, but to the best of his recollection merely. To which the counsel for the prisoner excepted.

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The prisoner's counsel introduced John C. Maund as a witness, to impeach, collaterally, some of the witnesses on the part of the State, who had testified to the homicide taking place after dark, between seven and eight o'clock; that it was a tolerably dark night, but that they could distinguish, at the distance of ten paces on the public square at Talbotton, whether a man had on a white or a black hat or cap, and stated that there was but one person near the deceased when he was stabbed, and *that* person had on a black hat, and was a tall, spare-built, person, &c., (corresponding with the description of the prisoner.) Maund, and another, had experimented, between the same hours, of a similar star-light night, and satisfied themselves that objects could not be distinctly distinguished at the distance of ten steps. The testimony of Maund was objected to, and he was rejected by the court below. And the counsel for the prisoner excepted.

HINES HOLT and HENRY L. BENNING, for the prisoner.

LEVI B. SMITH and E. H. WORRELL, for the State.

By the Court—LUMPKIN, Judge.

The prisoner was convicted of murder in the Superior Court of Talbot County, in March, 1846; and from the judgment then rendered against him he has appealed to this court. He complains of certain irregularities in the proceeding, and assigns for error, *first*, that the court refused to continue the case. It appears from the record, that after the arraignment, counsel for the prisoner moved a postponement of the trial, upon the ground that William Hammock, a material witness for him, was absent without his consent or procurement, and he rendered as an excuse why he had not been subpoenaed, that the witness was confined in jail, and his presence, *therefore*, expected.

The court declines expressing any opinion upon this exception, for the reason that the point cannot again arise on the *new trial*, which we feel constrained to award, on other grounds; and we dismiss this branch of the case with a single observation. The refusal of the court below to continue the indictment, could not be assigned as error but for the statute creating this court.—6 *Cranch's Rep.* 206. There is great danger of doing mischief by revising matters of this kind, which should properly be confided to the discretion of the court below, to be regulated by the circumstances of each particular case. No precise rule can be laid down, and a most arbitrary and oppressive exercise of this discretion must be made apparent to this court, before it will interfere.

Another error complained of by the prisoner, is, that Pulaski Posey, the seventh man on the jury list, being called, the court allowed the solicitor for the State to *pass him by*, until the remainder of the panel was gone through; and the same practice was preserved respecting other jurors.

Anciently, by the common law, any number of jurors might have been peremptorily challenged by the crown, without alleging any other reason for the objection than "*quod non boni sunt pro rege*," that they were not good men for the king. But this power being found very liable to

and mischievous to the subject, tending to infinite delays and dangers, it was taken away by the 33 *Edw. 1, statutes 4*; commonly called *ordinatio de inquisitionibus*. By this it is enacted, *quod de cetero, licet pro domino rege dicatur, quod juratores, &c., non sunt boni pro rege; non propter hoc remaneant inquisitiones, &c.; sed assignes, certam causam calumnie sue, &c.*, whereby the king is now restrained.—*Thomas' Coke, 474, note n.* This ordinance of inquests directs, that when a juror was challenged for the king, the inquisition should not, therefore, remain untaken; but those who sued for the king should show some cause of challenge, and the truth of such cause should be inquired of, according to the custom of the court; after which, the inquisition should be proceeded in or not, according as the challenge was established or not.

In the construction of this statute, it is clearly settled, and is now the established practice of the courts, that if the king challenge a juror before the panel is *perused*, he need not show any cause of his challenge till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged; and if the defendant, in order to oblige the king to show cause presently, challenge *touts paravails*, yet it hath been adjudged that the defendant shall be first put, to show all his causes of challenge, before the king need to show any.—*Lord Raymond, 473; Skinner, 82; 2 Hale's His. P. C. 271.*

Challenges, in England, on behalf of the *defendant*, were either peremptory or for cause. The number which, in all cases of felony, the prisoner was allowed by the common law thus peremptorily to challenge, amounted to thirty-five, or one under the number of three full juries.—*Com. Dig. Challenge, c. 1; 2 Woodd. 493, Burnes on Juries, 4.* This number has been restricted to twenty of the jurors, in *murder*, by 32 *Hen. 8, ch. 14, sec. 7.*—4 *Black. Com. 353.*

The history of challenges, then, is briefly this: that originally, in Britain, the crown might challenge peremptorily any number of jurors; that by the 33d *Edward 1st*, the king could not challenge *any juror, without cause*; but that he was not bound to show cause, till all the panel was called over, and not then, unless, from challenge or otherwise, the jury is incomplete; that the prisoner was entitled, at common law, to thirty-five capricious challenges, which number is reduced and limited by the 32d *Hen. 8th*, to *twenty*, in murder and other felonies. And now the important question for our consideration is, how have the rights of the State and its citizens been effected by the penal code of 1833?

By the 15th section and 14th divisions of that code, it is provided, "that every person indicted for a crime or offence, which may subject him or her, on conviction, to death, or four years imprisonment or longer in the penitentiary, may peremptorily challenge twenty of the jurors empaneled to try him or her. And the State shall be allowed one half the number of peremptory challenges allowed the prisoner."—*Prince, 660.* Now, it will be perceived that under our code, the rights of the *defendant* are precisely the same as they were before; while *ten peremptory challenges* are given to the State. Can it be believed that a code, professedly adopted to mitigate the rigor of the old law, intended to give this advantage to the State, in addition to the privilege which it already enjoyed, of setting aside any number of jurors, until the whole panel is exhausted? The cotemporaneous interpretations of the statutes, by

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almost all the circuits in the State, from the period of its passage, would negative this idea. The very language of the code, proves that the authors of it designed that the prisoners should enjoy double the advantage of the people in the trial. The State is entitled to one *half* the challenges allowed the accused. But this, with the privilege previously practised, in passing by jurors, is decidedly better than the *twenty* peremptory challenges allowed the defendant. The code itself professes "to *reform, amend, and consolidate* the penal laws of the State of Georgia." Nor are we at liberty to go out of it, or beyond or back of it, to ascertain the *mode* of trial or the relative rights of the parties. It dictates the question to be propounded to a juror on his *voire dire*, to test his competency, allowing to the State or the prisoner, if his answer is not satisfactory, the right to put such juror on his trial, *in the manner pointed out by law*, the code adopting the procedure at common law in this particular, and thus making it a part of itself. The *State vs. Benton*, (2 Dev. and Battle, N. C. 200,) is certainly an authority in support of the doctrines contended for in behalf of the prosecution: for by the act of the Legislature of that State, passed in 1827, *four*, instead of *ten*, peremptory challenges are given to the State. There is nothing, however, in this statute which indicates the intentions of the Legislature to adjust and fix the *relative rights* of the State and the prisoner. Nor does the act profess to *reform, amend, and consolidate* the penal laws of that State, in criminal cases. And with all possible deference for the distinguished judge who made that decision, one whose death was lamented throughout the Union, as a national calamity, (a) we must say, that the footing upon which the Supreme Court of North Carolina puts the law, would not justify us in following this precedent. "It may not be amiss," says the court, "to remark, that the practice of permitting the prosecuting officer to defer showing his cause of challenge to the excepted jurymen, until the panel be gone through, must be exercised under the supervision of the court, *who will restrain it, if applied to an unreasonable number*. On the trial of Horne Tooke, for treason, as many as seven, out of a panel of more than two hundred, were thus removed to the end of the panel; and this was not deemed an unreasonable number; though, in consequence of the very many persons excused, it was in the end likely to produce a serious inconvenience to the prisoner, which was only prevented by the honorable conduct of the attorney-general." It need hardly be asked, shall a legal right, affecting vitally the life and liberty of our fellow-citizens, depend, in this State, either upon the discretion of the courts or the "*honorable conduct*" of the prosecuting officer? We think not.

Justice in this way would not be meted out alike to all of our people. In the case under discussion, the record shows, that seven, out of the first panel of forty-eight, and nineteen, out of forty-one, or about one half of the *next tales* panel of the same number, were thus passed by the State. Was or was not this an unreasonable number? It far exceeded the exercise of the privilege in Tooke's case.

After mature consultation, then, on this alleged irregularity, so deeply concerning the purity of trial by jury, and the rights of defendants, the court agree that the exception is well founded.

(a) Hon. WILLIAM GASTON.

The *third* error relied upon by the prisoner for the reversal of this judgment, and which, like the one just disposed of, has been argued, with great ingenuity by counsel on both sides, is the rejection of certain testimony tendered by the defendant in the progress of the trial.

William Miller, a lad of thirteen years of age, was introduced among other witnesses in behalf of the State. He was asked, upon the cross-examination, by prisoner's counsel, whether he had not, at a certain time and place, and in the presence and hearing of certain persons, naming them, made statements which were recapitulated to the witness, and materially different from his present testimony? He answered, "*that he did not remember to have told William Wynn, (one of the individuals designated,) but thinks he never had any conversation with him about the matter, at Page's grocery or any where else.*" William Wynn was then introduced, and after being sworn, asked if Miller had not, at the time and place specified, and before Fleming Freeman and himself, made the representations referred to in the interrogatory put to him. The witness was stopped by the solicitor, and rejected by the court, upon the ground, that his testimony did not contradict Miller, whose denial was not positive and absolute, but to the best of his recollection merely.

The rule of evidence, as now understood, appears to be, that before the credit of a witness can be impeached, by proof, that he has made statements out of the court contrary to what he has testified at the trial, that it is necessary first to inquire of the witness himself as to the time, place, and person, involved in the supposed contradiction. Such was the unanimous opinion of the learned judges, as delivered by Chief Justice Abbott, in the Queen's case.—2 *Brod. and Bing.* 313, 314; 1 *Moody Malkin*, 473. In this country the same course is understood to be pretty generally adopted.—1 *Green. Ev.* 516, notes.

In some of the States the rule is strenuously resisted, as an innovation upon the law. And in *Tucker vs. Welsh*, (17 *Mass. Rep.* 166,) Parker, C. J., says: that the practice in that State, ever since it can be remembered, has been otherwise, and that if the principal witness is present, he is called upon to attend; and he then has an opportunity, after it has been shown that he had made different statements, out of court, to explain or deny. If he denies them, the credibility of the opposing testimony, is to be decided by the jury. He asserts that, no lawyer in that commonwealth can recollect an instance of an impeaching witness being stopped, until the other was called up, and asked, whether he had had any conversation with the person about to impeach him, and was reminded of that conversation.

He insists that the practice adopted by the British House of Lords, on the trial of Queen Caroline, has never been adopted in this country, and *seems not to have been very familiar there*; otherwise it would hardly have been necessary to have taken the solemn opinion of all the judges of the Court of King's Bench upon the question.

The learned judge moreover suggests that the utility of the practice is not very obvious. That witnesses about to be impeached are, generally, persons of a doubtful or unknown character; and the wisdom of putting them upon their guard, and enabling them to forestall an answer to a posing witness, is not very discernable. Phillips lays down no rule of evidence; on the contrary, he expressly states, that a wit-

ness may be impeached, by proving that he had given a different account of the thing; and a letter, written by him, to this effect, may be used against his testimony, and this without asking him upon the stand whether he had written such a letter, and what were the contents of it. And *Peake* states, that declarations made by a witness, on the same subject, contrary to what he swears on the trial, may be given in evidence to impeach his credit, and no qualification of this doctrine is laid down.

The foregoing views are not without weight. It is not necessary, however, in the present case, to decide between them and the utility and convenience of the rule, as settled in the *Queen's* case.

Here the witness was asked, upon cross-examination, whether or not he had said, or declared, that which was intended to be proved. His answer was that he did not remember, but that he did not think that he ever had made the statements imputed to him. Can he be contradicted? There is a dictum in *Roscoe on Criminal Evidence*, (page 171,) citing *Paine vs. Reeston*, (1 *Moo. and Rob.* 20,) to this effect: "Where the witness merely says that he does not recollect making the statements, evidence to prove that he did, in fact, make the statements, is inadmissible; there must be an express denial." We cannot recognize this proposition as sound law.

In *Crowley vs. Page*, (7 *Carrington and Payne*, 792,) this point came directly before the court. The answer of the witness there was, *that he did not recollect* making the statements. Talfourd, sergt., proposed to call John Burton, to prove that William Beard had said that the hay was of good quality. Ludlow, the opposing counsel, remarked it could not be done, as Beard *did not deny* having said so. Parker, Baron: "He did not admit and he did not deny it. Evidence of statements by witnesses on other occasions, relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible, in order to impeach the value of that testimony; but it is only such statements as are relevant, that are admissible; and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and as I conceive for that purpose only; the witness may be asked whether he ever said what is suggested to him, with the name of the persons to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity of giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so, you could never contradict a witness who said *he could not remember*."

We believe the true rule to be here stated, and that upon every consideration of reason, public policy and authority, the evidence should have been admitted. If the witness has honestly forgotten what he did say, it ought to be permitted to show his early and fresher recollections of the matter, which is likely to have been more accurate. Besides, should he even deny positively ever having made the declaration, it is nothir more after all than saying that he did not recollect to have done so.

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his asseverations, however absolute, must rest upon the fidelity of his memory. But the main argument in favor of the reception of the testimony is founded upon the strong temptations in pliable witnesses to screen themselves from contradictions, under this evasive form of answering.—*See Stahle vs. Spohn*, 8 *Serg. and Rawle*, 307; *Everson vs. Carpenter*, 17 *Wend. Rep.* 419. It is finally argued by prisoner's counsel, that the court erred in refusing the testimony of John C. Maund, who was offered to impeach collaterally some of the witnesses on the part of the State, who had testified to the homicide, by showing that he had experimented, in company with another individual, between the same hours of a similar star-light night, and satisfied himself that objects could not be distinctly discerned at the distance the witnesses were situated from the parties. We are of the opinion that this evidence was properly repelled. The difference in men's visions, and the uncertainty as to the exact quantity of light on both nights, would render the proof too uncertain to be relied on. Moreover, the record shows that there was light, and reflected occasionally upon the scene of this tragedy, from some of the surrounding houses.

Upon the second and third grounds, then, the judgment must be reversed, and the cause remanded.

No. 30.—JERNIGAN, LAWRENCE & Co., plaintiffs in error, vs. F. D. WIMBERLY, survivor, &c., defendant in error.

An instrument as follows, viz.—“We have this day sold to J. L. & Co. our entire crop of cotton, at 9 cents per lb. all round, and should they not realize that amount nett, we agree to make good the loss —(Signed) D. M. L.—F. D. W.” is the joint instrument and undertaking of the makers, D. M. L. and F. D. W., and is sufficiently certain and reciprocal to support an action, under proper averments and proofs, by either of the parties against the others.

The rule as to certainty is, that the agreement must be so certain and complete that each party may have an action upon it.

The omission of J. L. & Co. to subscribe the instrument does not invalidate it. Nor would that omission form any legal objection to an action against them for the stipulated price of 9 cents per lb. for the cotton thereby sold and delivered.

This was an action predicated upon the foregoing instrument, tried before Judge Alexander, in the Superior Court of the county of Stewart, at April Term, 1846.

For the facts and circumstances of the case, and the grounds of error alleged, the reader is referred to the opinion of the Supreme Court.

HENRY L. BENNING, for the plaintiff in error.

HINES HOLT, for the defendant in error.

By the Court—NISEBET, Judge.

The action in this case was brought on the following instrument, to
“We have this day sold to Jernigan, Lawrence & Co. our entire crop

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of cotton, at nine cents per lb. all round ; and should they not realize that amount nett, we agree to make good the loss. 13th Feb., 1838. I, D. M. Leseur, have sold Green Sims' crop upon the same conditions.

Signed, DRURY M. LESEUR,
F. D. WIMBERLY."

This instrument was tendered in evidence by the plaintiffs, to make out their case against F. D. Wimberly—Leseur, who had been also sued, having died. The defendant demurred to the testimony, upon two grounds :

1st. Because the instrument is void, for uncertainty.

2d. Because the instrument is the several, and not the joint, contract of the signers, and cannot, therefore, be sued upon jointly.

The court sustained the demurrer, upon both grounds ; to which decision the plaintiffs in error except ; and we think the exceptions well taken, and reverse the judgment.

And first, as to the second ground. There are two contracts on this small paper : one between D. M. Leseur and F. D. Wimberly and the plaintiffs, Jernigan, Lawrence & Co. ; and the other between D. M. Leseur and the plaintiffs. The latter is for the sale of Green Sims' crop of cotton, with which we have nothing to do. The action was brought against Leseur and Wimberly, to recover the loss on the sale of their crop of cotton. The language of the instrument is joint throughout. The words are, *we have sold our entire crop (not crops) of cotton ; and we agree to make good, &c.* The only inference that we can draw from this paper is, that it is a joint sale of one crop of cotton owned by Leseur and Wimberly jointly. There is not a word importing severalty in it.

This is an agreement for sale of cotton, or rather a contract of sale. We do not find it very fully or technically drawn. A good lawyer would scarcely have left it so uncertain. Yet we think it sufficiently certain to show the intention of the parties, and to be the foundation of this action. A contract is an agreement of two, or more, persons, upon sufficient consideration, to do, or not to do, a particular thing.—2 *Black. Com.* 442 ; 2 *Kent*, 449. Certainty and mutuality are necessary to a valid contract. The assent of the parties must be mutual. A contract must be founded on a consideration : without it, it is *nudum pactum* ; but the least consideration will create reciprocity, and make an agreement a valid contract.—2 *Black. Com.*, ch. 30, *tit. Contract*. The rule as to certainty is, that the agreement must be so certain and complete, that each party may have an action upon it.—*Chit. on Con.* 4. Now, to apply these elementary principles to the agreement before us, premising, yet farther, that its not being signed by the plaintiffs does not make it invalid : the undertaking on the part of the plaintiffs is to pay Leseur and Wimberly nine cents per lb. for their cotton ; the consideration upon which that undertaking is founded is the receipt and ownership of the cotton. Now, that is quite consideration enough, in all conscience, to support a contract. Nor can it be doubted but that, after delivery of the cotton to Jernigan, Lawrence & Co., an action would lie in favor of Leseur and Wimberly against them for the price to be paid. The undertaking on the part of Leseur and Wimberly is to make good to Jernigan, Lawrence & Co. whatever loss they may sustain in the sale of the cotton ; that is, to pay them the difference between nine cents per lb. for the cotton and what they may realize upon it. The consideration moving them to this undertaking is the price of the cotton, at ni-

cents per lb., agreed to be paid. Upon this undertaking an action (the present action) will certainly lie against them. We do not look into the pleadings—of course the declaration ought to contain all the averments, (and they ought to be proven,)—necessary to the plaintiffs' recovery upon this contract: such as payment of the price agreed upon, a fair sale of the cotton within a reasonable time, and the amount of the loss realized, &c. According to this analysis of this contract, it is founded on sufficient consideration, is sufficiently certain, and the benefits and obligations growing out of it are reciprocal. It is not our business to inquire whether such a contract be sensible, or equal, or just. The parties are made by the law the sole judges of these questions. Mr. Chitty says: "It would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties, by not allowing them to be the sole judges of the benefits to be derived from their bargains; provided there be no incompetency to contract, and the agreement violate no rule of law." —*Chit. Con. 7.*

We think the paper ought to have been admitted in evidence, and reverse the judgment of the court below.

No. 31.—JOHN REYNOLDS, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Under an indictment for murder, the jury may find the prisoner guilty of the lesser offence of manslaughter, either voluntary or involuntary, and the verdict will be legal, although there is no count for manslaughter in the indictment.

The statute of limitations does not run against an indictment found for murder, though on the traverse the prisoner is found guilty of manslaughter only.

Upon an indictment found for manslaughter only, the statute would run from the death, and not from the time the mortal wound was given.

The practice in England, upon the construction of the act of 33 *Edward 1*, of passing jurymen in criminal cases, until a whole panel is exhausted, and a jury not made, before the Crown can be called upon to show cause, is not authorized in this State, since the adoption of the penal code.

As the jurors are called, the State must put them upon the prisoner, or otherwise challenge them, either peremptorily to the number allowed by law, or for cause.

The act of 1843, prescribing certain questions to be propounded to jurors, to test their competency for the trial of capital offences, is not applicable to any case which arose previous to its passage.

A juror who states upon oath, in answer to said statutory questions, that he has formed and expressed an opinion with regard to the guilt or innocence of the prisoner from hearsay, is not an *impartial juror*, as contemplated by the Constitution, which declares that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an *impartial jury*."

Facts that occurred at, or about the time of the fatal rencounter—such as, that the deceased was armed; that, some twenty or thirty minutes before the difficulty, he had fired off and reloaded two pistols, and put them in his pantaloons pockets, at his own house, which was two or three hundred yards off, and then started immediately for the public square, where the rencounter took place; that when he arrived at the public square, he had upon his person, and in his pocket, a loaded

pistol, or pistols, of the same kind and description as the one found at his side on the ground where he fell, after being shot by the prisoner—are competent, and admissible in evidence, without precedent proof that the prisoner had knowledge of them.

This was an indictment for murder, in the Superior Court of the county of Stewart, tried before Judge Alexander, at April Term, 1846, and resulted in a conviction of the prisoner for voluntary manslaughter. The bill of indictment in this case contained a single count for murder, and was found at the October adjourned term of said court, in the year 1844. At the April Term thereafterwards, the prisoner was arraigned, and plead "not guilty." The murder was alleged in the indictment to have been committed on Jefferson J. Lamar, by the prisoner, in Lumpkin, Stewart county aforesaid, by shooting. The mortal wound was given on the 4th day of October, 1840, of which the deceased languished until the 15th day of December, 1840, when he died of said mortal wound, in the said county.

The case came on to be tried at the said April Term, 1846, and thereupon the court caused to come a panel of forty-eight men as jurors, that a jury of twelve might be obtained to try said issue; and the said panel having been called over, and found present, the court caused the same to be put upon the prisoner, and him to be informed that the said panel would again be called; and that then, if he had any cause of challenge against them, or any of them, he should make it known, as they were being called to the book to be sworn, and before they were sworn, and the court would hear him. The clerk then commenced to call said panel one by one, in the order in which their names were entered on the *renire*, beginning at number one, and continuing through the panel, ending with number forty-eight. The juror number one being acceptable to both parties, was sworn in chief; number two was peremptorily challenged by the prisoner. The juror number three, Cyrus Lee, was called, when the counsel for the State objected to him, but assigned no cause, claiming for the State the right to pass such juror by until the whole panel should be gone through with, and be found insufficient to make a full jury of twelve; and that for so doing the State was not bound to show any cause, or to lose any of the peremptory challenges given by virtue of the penal code: And thereupon the counsel for the prisoner objected to the right so claimed on the part of the State, which objection was overruled by the court, and the juror Lee was passed by; to which decision of the court the counsel for the prisoner excepted. The call of the jurors was then resumed, and the counsel for the State caused divers jurors to be passed by, as in the case of the juror Lee. After thus completing the call of said panel the first time, and having failed to make up a jury of twelve, the call was resumed of those who had been passed by, beginning at the juror Lee, and continuing through, and still failed to make up a jury of twelve.

Elijah Lindsey, one of the jurors, being called and sworn on his *voir dire*, the solicitor-general proposed to propound to him the questions as provided by the act of the legislature of 1843, to wit: "Have you, from having seen the crime committed, or from having heard any part of the evidence delivered on oath, formed and expressed any opinion with regard to the guilt or innocence of the prisoner at the bar?" To which the counsel for the prisoner objected, and the objection being overruled

the-court, said question was propounded to the juror, and the counsel for the prisoner excepted.

Two other panels of twenty-four men each were then successively called in, and put upon the prisoner, the State passing by many jurors, as in the case of the juror Lee. Samuel Starr, whose name appeared upon the third and last panel, being sworn on his *voir dire*, and in answer to the question aforesaid, stated that he had, from report, formed and expressed an opinion with regard to the guilt or innocence of the prisoner. The counsel for the prisoner thereupon objected to his competency as a juror, because such formation and expression of opinion showed bias or prejudice; which objection being overruled by the court, and the juror pronounced competent, the counsel for the prisoner excepted.

A jury of twelve men having been made up and sworn to try said issue, the counsel for the state introduced several witnesses, who were sworn and examined, and proved the homicide, and closed their case.

The counsel for the prisoner then introduced divers witnesses, and among them John S. Randle was introduced, and being sworn, was asked the following questions:

1st. Whether, when Lamar returned to the house at about four o'clock on the evening of the day of the alleged shooting of him by Reynolds, he (Lamar) was armed?

2d. Whether, when Lamar returned from his house to the public square in Lumpkin, twenty or thirty minutes after having gone thither, he was armed with two pistols?

3d. Whether, when Lamar was so at his house, he did not fire off and reload his two pistols, and put them in his pantaloons pocket, and start off again immediately to the public square in Lumpkin?

4th. Whether, when Lamar returned to the public square aforesaid, he did not have loaded, upon his person and in his pockets, a pistol or pistols of the same kind and description as that found at his side on the ground when he fell after being shot.

The counsel for the State objected; and the court below decided that said several questions were illegal, and should not be answered by the witnesses, because the testimony theretofore delivered in said case did not show that the prisoner at the time of the shooting of Lamar had received any notice of any of the facts proposed to be proved by the witness, Randle, by said questions. And thereupon the counsel for the prisoner excepted.

The said case, after argument of counsel on both sides, was submitted to the jury under the charge of the court, and the jury returned their verdict, finding the prisoner guilty of voluntary manslaughter.

And thereupon the counsel for the prisoner, before judgment on said verdict, submitted to the court, after due notice to the state's counsel, a motion in arrest of the judgment, and notice also of a motion for new trial to be made, if the motion in arrest should be overruled.

The motion in arrest of judgment was based upon the following grounds:

1st. Because the indictment in said case was for murder only, and not for manslaughter.

2d. Because the verdict contained no finding by the jury as to murder, only as to manslaughter.

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3d. Because the indictment in said case was not found and filed in said court, within four years next after the commission of the offence charged in the bill of indictment.

4th. Because the jury found the defendant guilty of manslaughter, upon a bill of indictment for murder, which was not found and filed in said court within four years next after the commission of the offence therein charged.

5th. Because the record in said case is in other particulars informal, insufficient and void, and the legal judgment of the court cannot be pronounced upon it.

And, if overruled in the foregoing motion, the prisoner would then move for a new trial on the following grounds :

1st. Because against the motion and objection of prisoner's counsel the court permitted the state to challenge and pass divers jurors when called, (after the array had been put upon the prisoner,) without compelling the state to show any cause for such challenges, or to exhaust any of its peremptory challenges, under the penal code, until the whole panel had been gone through.

2d. Because the court decided that the questions testing the competency of jurors, provided by the act of 1843, might be propounded to jurors in said case, and because thereupon the said questions were propounded to divers of them, notwithstanding that said offence was charged and proven to have been committed prior to said act.

3d. Because the court decided that the answer of a juror to the first of said statutory questions, that he had formed and expressed an opinion in relation to the guilt or innocence of the prisoner from hearsay, did not prove said juror to have any prejudice or bias for or against him, or to be in any respect incompetent.

4th. Because the evidence showed that manslaughter, in said case, was barred by the statute of limitations.

5th. Notwithstanding the bill of indictment charged, and the evidence proved, the offence to have been committed on the 4th day of October, 1840 ; and the bill of indictment was not found and filed in court till November, 1844, more than four years after the commission of the offence, yet the court charged the jury that they might find the prisoner guilty of manslaughter.

6th. Because the court refused to allow the questions hereinbefore recited, to be put to the witness John S. Randle.

7th. Because the prisoner was not tried and convicted by a jury of good and lawful men, duly summoned, empanelled and sworn, according to law.

The motion in arrest, and also the motion for a new trial, were successively heard and overruled by the court below, and judgment was pronounced against the prisoner. To all which the counsel for the prisoner excepted.

The court charged the jury on said trial that they might find the prisoner guilty of manslaughter, either voluntary or involuntary upon said issue, under the evidence given in upon the trial of said case. And the counsel for the prisoner excepted to said charge.

Error was assigned in each of the matters excepted to.

HINES HOLT and HENRY L. BENNING, for the prisoner.

A. H. CHAPPELL, for the State.

On the 4th of October, 1840, the prisoner shot Mr. J. L. Lamar in the public square in Lumpkin. Mr. Lamar died of the wound in December, 1840.

The indictment for murder, under which the present conviction took place, was found by the grand jury at the Oct. Term of Stewart Superior Court, a little more than four years after the giving of the mortal wound, but less than four years after the death of Mr. Lamar therefrom.

The statute of limitations was not set up, or insisted on as a defence, either by pleading or in any other manner, during the pendency of the indictment. It is only after the trial had terminated by a conviction for manslaughter, that the prisoner for the first time lays hold of the statute, as one of his grounds, in a motion for a new trial.

1st Objection. That it should have been pleaded, and could not have been taken advantage of without pleading, even if the indictment had been for manslaughter. Nor does the circumstance of the time of giving the mortal wound, or of the killing, appearing on the face of the indictment, to have been more than four years before the filing of the same, do away the necessity of pleading directly, that the indictment was not found and filed within four years after the commission of the offence.—*Ewen vs. Jones*, 6 Mod. 26. In the same case it was said by the court, the statute of limitations being a statute barring of right, ought to be taken strictly.

2d Objection. And still further, even though the indictment had been for manslaughter, and the *stat. lim.* pleaded thereto, the plea would have been bad, because, though the mortal wound was inflicted on the 4th Oct., 1840—more than four years before the indictment was found—yet death did not ensue therefrom till the middle of Dec. afterwards, less than four years before the finding of the indictment. And it is quite clear that the time of the death, and not that of the wounding, is the period from which the statute commences running.—*Petersdorf Abr.*, vol. 12, p. 340, *note*.

The offence is not complete till the death, and therefore, at common law, if a man died in one county of a mortal stroke received in another, it was the general opinion that he was indictable in neither county; to remedy which, *stats. 2 and 3 (Wen. 6.)* were passed, making the offence indictable in the county where the death took place.—2 *Hawkins*, 315-16.

But, *3dly.* It is not an indictment for manslaughter, but for murder, to indictments for which there is no limitation of time set by the statute. The attempt now is to put a conviction for manslaughter (although on an indictment for murder) on the same footing with an indictment for manslaughter, which cannot be done; because, 1st, It is the indictment which is barred by the statute in all the cases to which its bar is applicable. But in no case is the bar of the statute applicable to an indictment for murder.

At common law there was no limitation in any case to a criminal prosecution by indictment.—*Petersdorf Abr.* vol. 12, p. 340; *Donan vs. Maestaer*, 5 *Esp. R.* 92.

Stats. lim. generally are to be construed strictly as laid down in 6 Mod. 26, because they are in bar of right.

Moreover, statutes in restraint, derogation, or alteration of the common law, or of common law rights, are to be strictly construed; for *sts.* are not presumed to make any alteration in the common law, further or otherwise than the act expressly declares.—*Bac. Abr.* 6, 384; 11 Mod. 150.

Objection to the mode of challenging Jurors.

At common law, the king might challenge peremptorily as many as he saw fit, of any jury returned to try a cause to which he was party.—*Hawkins' Pleas Con.* 579-80; *Co. Lit.* 156.

But by *st. 33 Edw. 1*, all peremptory challenges were taken away from the king, so he was restricted to challenges for cause; settled, that the king did not ~~show~~

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his cause of challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person challenged.—*Ib. Harg. Note*, 282, to *Co. Lit.* ; 4 *Bl.* 353 ; 1 *Chit. C. L.* 533-4 ; *Joy*, 143.

And so was the law of Geo. till the penal code of 1833, which, for the first time, gave the State peremptory challenges.—*Prin. Dig.* 660.

This provision is merely affirmative and cumulative, giving to the State half the number of peremptory challenges to which the accused is entitled. It is a palpable *non sequitur* to say, that by such a provision, the State's pre-existing right of challenging for cause is affected in any way, either as to its extent, or as to the manner in which it shall be exercised.

By the Court—WARNER, Judge.

In this case a motion was made in arrest of judgment, and for a new trial. The counsel for the plaintiff in error moved to arrest the judgment on the following grounds : Because the indictment was for murder only, and not for manslaughter. Because the verdict contained no finding by the jury as to murder, but only as to manslaughter. Because the indictment was not found, and filed in court, within four years next after the commission of the offence charged in said bill of indictment. Because the jury found the defendant guilty of manslaughter upon a bill of indictment for murder, which was not found and filed in said court within four years next after the commission of the offence therein charged ; and because the record in the said case is in other particulars informal, insufficient and void, and the legal judgment of the court cannot be pronounced upon it. The first and second grounds taken in the motion to arrest the judgment, will be considered together. By the first section of the fourth division of the penal code, (*Prince's Dig.* 622,) homicide is declared to be, the killing of a human being, of any age or sex, and is of three kinds—murder, manslaughter, and justifiable homicide. Manslaughter is the unlawful killing of a human creature, without malice, either express or implied, and without any mixture of deliberation whatever ; and is homicide, inferior in degree to that of murder. When the jury found the defendant guilty of manslaughter, it negatives the idea that he was guilty of murder, and in our judgment it was clearly competent for the jury to find the defendant guilty of the lesser offence of manslaughter, on an indictment for murder, without any count therein for manslaughter.—*1st Russell on Crimes*, 474 ; *1st Hale*, 449 ; *2d Hale*, 302 ; *1st Chitty's Criminal Law*, top page, 206. The third and fourth grounds taken in arrest of judgment, will also be considered together. By the thirty-fifth section of the fourteenth division of the penal code (*Prince's Dig.* 662) it is declared, " Indictments for murder may be found and prosecuted, at any time after the death of the person killed. In all other cases, except murder, where the punishment is death, or perpetual imprisonment, indictments shall be filed and found in the proper court, within seven years next after the commission of the offence, and at no time thereafter. In all other felonies, the indictments shall be found, and filed in the proper court, within four years next after the commission of the offence, and at no time thereafter." It is contended, inasmuch as the defendant was found guilty of voluntary manslaughter only, it is such an offence as would be barred by the statute in four years. The indictment was for murder, and we are inclined to the opinion, that the statute does not run against indictment

found for that offence, although on the traverse the defendant should be found guilty of manslaughter only; but it is not necessary for us to place our opinion in this case on that ground. By the record, it appears, the indictment was found at the October adjourned term of the Superior Court, in the month of November, 1844; and Lamar, the deceased, did not die until the 15th December, 1840, so that four years had not elapsed from the death of the party alleged to have been killed until the finding the bill of indictment in the proper court. The homicide was not in fact consummated until the death of Lamar, and the defendant could not have been indicted therefor until that time. The record presents nothing which, in our opinion, would authorize an arrest of the judgment upon either of the grounds taken, and that the court below decided correctly, in overruling the same.

The first ground taken for new trial is, that the court permitted the State to challenge and pass divers jurors when called, after the array had been put upon the prisoner, without compelling the State to show any cause for such challenges, or to exhaust any of its peremptory challenges under the penal code, until the whole panel had been gone through. In the case of the *State vs. Sealy*, decided during the present term of this court, we held, the decision of the court below, permitting the counsel for the State to pass jurors without peremptorily challenging them, as required by the penal code, was erroneous, and do now so rule in this case.

The second ground of error assigned is, that the court below erred, in deciding that the oath required by the act of 1843, testing the competency of jurors, might be propounded to them, notwithstanding the offence for which the defendant was indicted was charged, and proved, to have been committed before the passage of that act. By the code of 1833, which was the law at the time of the commission of the offence charged in the indictment, the oath prescribed to jurors for the trial of all crimes punishable by death, or imprisonment and labor in the penitentiary, was in the words following: "Have you formed and expressed any opinion in regard to the guilt or innocence of the prisoner at the bar?" By the act of 1843 this oath was altered, and the following oath prescribed: "Have you, from having seen the crime committed, or having heard any part of the evidence delivered on oath, formed and expressed any opinion in regard to the guilt or innocence of the prisoner at the bar?" It was contended at the bar, the act of 1843, when made to apply to the defendant for an offence committed prior to its passage, was an *ex post facto* law. To this it was replied, the act of 1843 did not aggravate the crime, nor the punishment thereof, but only affected the mode of the trial. In *Colden vs. Bull*, (3d Dallas Rep. 386,) Mr Justice Chase, in stating what he considered to be *ex post facto* laws, prohibited by the constitution, says: "Every law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offence, in order to convict the offender; all these, and similar laws, are manifestly unjust and oppressive." By the law, as it existed at the time of the commission of the offence, the defendant was entitled to be tried by those who had neither formed nor expressed any opinion, with regard to his guilt or innocence, either from the information thers, or any other of the many circumstances which enable mankind to form their opinions with regard to the conduct of their fellow-citizens.

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By the act of 1843, the right to select his triers was greatly circumscribed. If the juror put upon him by the State had formed and expressed an opinion in favor of his guilt, yet, if he had not formed and expressed such opinion, from having seen the crime committed, or hearing the evidence delivered on oath, he would be a competent juror. The *practical* effect of compelling the defendant to select his jurors under the rule prescribed by the act of 1843, would be greatly to impair his chance for acquittal, and enhance the danger of his conviction. If the legal rules of evidence have not been altered, for the purpose of *convicting him of the offence* with which he stood charged, the legal rules of evidence most certainly have been altered, by which the competency of the jurors is to be ascertained, who are to *try the defendant for the offence*. By the act of 1843, his chances for escape are greatly diminished, and his conviction rendered much more certain. Although the act of 1843 may not be *technically* an *ex post facto* law, yet, when made to apply to the trial of the defendant for an offence committed before its enactment, gives to it a *retrospective* operation, which, in our judgment, ought not to be sanctioned in the administration of *criminal law*. The defendant, in our opinion, was entitled to have had his triers selected according to the rules of evidence, prescribed by the law, as it existed at the time the offence was committed. The next ground of error assigned for new trial is, that the court below decided, that a juror who answered he had formed and expressed an opinion, in relation to the guilt or innocence of the prisoner at the bar, from report or hearsay, was a competent juror. The Constitution declares: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury*." Can he be said to be an impartial juror, who has both formed and expressed an opinion with regard to the guilt or innocence of the accused? But it may be replied, that opinion was formed and expressed from the *report* or *hearsay* of other persons. Is it not an opinion, however, both *formed and expressed*? And he knows but little of the human mind who does not know the difficulty which is to be encountered, in combatting and removing such preconceived opinions. The fact that the opinion was formed and expressed from the report, or hearsay of others, does not in the least obviate the difficulty. How many men form and express their opinions, both as it regards religion, politics, and the moral conduct of their fellow-citizens, from the statements of their neighbors, in whom they have confidence? Indeed, there are many men who have more confidence in the expressed opinions of their intelligent neighbors, than they have in their own. We are, therefore, all of the opinion, a juror who states, on oath, he has formed and expressed an opinion, with regard to the guilt or innocence of the prisoner, from hearsay, is not an *impartial juror*, as contemplated by the Constitution.

The fourth ground assigned for error is, that the court charged the jury they might find the prisoner guilty of manslaughter, either voluntary or involuntary; whereas, he should have charged the jury that they could not so find. We are of the opinion, the charge of the court, as given, was correct and proper, under the law. The defendant was indicted for the offence of murder; manslaughter is an inferior grade of homicide, for which the defendant might properly have been found guilty, as has

already stated, in disposing of the motion in arrest of judgment in this case.

The fifth ground of error assigned in the motion for new trial, is, that the court refused to permit certain questions to be propounded to John S. Randle, a witness for the defendant. The counsel for the defendant, on the trial, introduced Randle as a witness in his behalf, and proposed to examine him as to the following facts: First, whether, when Lamar returned to his house, at about four o'clock in the evening of the day of the alleged shooting of him by the defendant, he (Lamar) was not armed? Second, whether, when Lamar returned from his house to the public square in Lumpkin, twenty or thirty minutes after having gone to his house, he was not armed with two pistols?

Third, whether, when Lamar was so at his house, he did not fire off and reload his two pistols, and put them in his pantaloons pockets, and start off again immediately to the public square aforesaid; and whether Lamar's said house was not within two or three hundred yards of the public square in Lumpkin?

Fourth, whether, when Lamar returned to the public square in Lumpkin aforesaid, he did not have, loaded, upon his person, and in his pockets, a pistol, or pistols, of the same kind and description as that found at his side, on the ground where he fell, after being shot?

This evidence was rejected by the court, on the ground, it did not appear the defendant had received any *notice* of the facts proposed to be proved by the witness. We are all clearly of the opinion, the court below committed error in rejecting this testimony. The facts proposed to be proved were immediately connected with the transaction; indeed, constituted a part thereof. As this case must undergo another investigation, perhaps it would not be proper for us specially to point out the importance of this testimony to the defendant. It is sufficient for us to declare that, in our judgment, the evidence was *competent*, and ought to have been received; leaving it to the jury to have given it such consideration as they might have thought it entitled to, as a *part of the transaction* which they were empaneled to investigate. Nor do we consider that the fact of *notice* to the defendant, had anything to do with the competency or incompetency of the testimony offered. The evidence is offered to prove *distinct facts*, which occurred at or about the time the fatal rencounter took place. If the defendant had attempted to prove a *threat*, on the part of the deceased, to do him some bodily injury, unconnected with any overt act, then, perhaps, it would have been necessary to have shown the defendant had a knowledge of such threat: but nothing of that kind was attempted to be proved by the witness.

The judgment of the court below must therefore be reversed, and a new trial granted, on the following grounds: First, because the court erred in permitting the State to challenge certain jurors in the record mentioned, without showing any cause, until after the whole panel had been gone through; it being the opinion of this court, the State is only entitled to such challenges as are allowed by the penal code. Second, because the court committed error, in permitting the questions, testing the competency of jurors, provided by the act of 1843, to be propounded to them, the offence having been committed before that time. Third,

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because the court below committed error in deciding a juror was competent, who answered, he had formed and expressed an opinion, in relation to the guilt or innocence of the defendant, from hearsay or report. And, fourth, because the court erred in refusing to allow the questions propounded to John S. Randle, mentioned in the record, to be answered by the witness for defendant.

No. 32.—WILLIAM TAYLOR, plaintiff in error, vs. WILLIAM TUCKER, defendant in error.

Books of accounts, about to be tendered in evidence, must be first proved to be the original books of entry, by the oath of the party introducing them, and then be submitted to the inspection of the court; and, if found free from all fraudulent appearances or circumstances—such as material and gross alterations, false additions, &c., and contain the first entries or charges, by the party, made at or near the time of the transaction to be proved—they are competent. If the contrary is discoverable from the books themselves, or comes out upon the examination of the party, they ought to be rejected. The credibility, both of the books and of the party, is to be weighed by the jury, and depends upon various circumstances, of which they are the judges.

Separate sheets of paper, containing the original entries of an account for lumber, though such sheets are attached to the declaration as the bill of particulars, are admissible in evidence, upon the footing of original books of accounts, and under the same rules and restrictions as are prescribed by the courts in the case of merchants' or shopkeepers' books.

It is not material whether the original entries of an account be made in a book or upon a separate sheet of paper; it is only material that it be an account of the dealing between the parties, and be primary and original.

When the plaintiff's only evidence is his original books or entries of his account, it becomes indispensable to prove *aliunde* by one or more persons who had dealt with him, that he was in the habit of keeping correct accounts.

This was an action brought by the defendant in error against the plaintiff in error, predicated upon an open account for lumber, and was tried before Judge Warren, in the Superior Court of the county of Randolph, at April Term, 1846.

For the facts and circumstances of the case, and the matters of error alleged, see the decision of the Supreme Court.

WM. TAYLOR, for plaintiff in error,

Contended that the plaintiff below could not support his books of original entries by his own oath alone; and in support of this position, cited *Boyd vs. Ladsden*, 4 *McCord*, 76; *Slade vs. Teasdale*, 2 *Bay*, 172; 2 *Bay*, 162; 3 *Phil. on Ev.* 686. The common law did authorize merchants' and tradesmen's books to be made evidence, under certain restrictions. But the common law was changed by the statute of 7 *James* 1, ch. 12, which required such suits to be brought within a year.—3 *Black. Com.* chap. 23, *top page*, 291; 1 *Phil. Ev.* 266.

2d. To be made evidence, the tradesman should show by his own oath, that the books tendered are his books of original entries; that they contain regularly the de-

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ings between the parties; that he had no clerk; that the articles charged were delivered; and that he keeps fair and honest books, by those who have traded with him.—*Vosburgh vs. Thayer*, 12 Johns. Rep. 461; *Linnell vs. Sutherland*, 11 Wendell, 568; 4 John. 483; 5 ib. 306.

3d. Where goods are sold and delivered by a clerk, the clerk himself must be introduced.—1 Phil. Ev. 263-4.

The books must show items sold and delivered by the tradesman, and those sold and delivered by the clerk, and the distinction must be made by evidence.—*Kaughley vs. Brower*, 16 Sergt. & Rawle, 133-4; *Wright vs. Sharp*, 1 Brown, 344; *Smith vs. Lane*, 12 Sergt. & Rawle, 80.

Goods delivered to a third person, even the servant of the purchaser, cannot be proved by the books.—*Kerr vs. Love*, 1 Wash. R. 172; *Deas vs. Darby*, 1 Nott & McC. 436. When goods are sold upon a written order, the order itself must be produced.—*Smith vs. Lane*, 12 Sergt. & Rawle, 80.

Books, to be evidence, must show that the entries were made at the time of delivery of the goods; otherwise the books must be rejected.—1 Rawle's R. 441; 3 Phil. Ev. 696.

It must appear that the party keeps regular books, and not upon scraps of paper.—*Lynch vs. Hugo*, 1 Bay. 23; *Pierce vs. Smith*, 4 Mass. R. 455.

! DAVID KIDD00, for the defendant in error.

For the general law relative to the admissibility of *shop-books* in evidence, cited *Greenleaf on Evidence*, vol. 1, pp. 142-148, and notes.

Goods delivered by servant during the day, and the entries made by the master at night, or on the following morning, from memorandums made by the servant: the entries considered original entries, and admissible in evidence.—1 *Greenleaf Ev.* 142, in notes; *Ingraham vs. Bockious*, 9 S. & R. 285.

Irregular memorandum books received as books of original entries.—*Cogswell vs. Dolliver*, 2 Mass. R. 217.

Entries transcribed from slate into book, considered original entries.—13 Mass. R. 427; *Faxon vs. Hollis*. It is no objection to book that it is kept in ledger form.—*Ib.* For the distinction between competency and credibility of book.—2 Mass. R. 217. The oath of the party is competent and admissible, to prove that his books are books of original entry.

By the Court—NISBET, Judge.

This was an action of assumpsit, brought by the defendant in error against the plaintiff, to recover a bill of lumber. A bill of particulars was appended to plaintiff's writ, which was admitted in evidence as his original entries, being first proven to be such by the oath of plaintiff, and proof being had also that the plaintiff was in the habit of keeping correct accounts. The lumber was delivered, it seems, in part by a person who swore that he kept memoranda of his sales, and reported them to the plaintiff; the plaintiff swearing that a part of the entries made in his account were made from the memoranda of his sawyer, as he reported to him; the sawyer further proving that he did not act as clerk for the plaintiff, but only as his employee, to saw and deliver lumber.

The points of error taken, grew out of the admission of the plaintiff to prove his own account, and the admission of the account itself as a book of original entries; and also out of the charge of the court in relation to the account.

The first error assigned is, that the plaintiff in the court below was entitled to prove, by his own oath, that the account sued upon was his

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original entries, and that he had no other book of original entries. In disposing of this assignment, it is proper to premise, that the record discloses that plaintiff kept no clerk, and that the account proven, was the identical paper upon which the plaintiff made his original entries; and that he made no other entries but these. The account contained various items of lumber, of different kinds, entered at different times, with the price of each item footed, and 25 per cent. upon the whole sum added—which addition of 25 per cent. made what is called, in the argument, the credit price of the lumber.

In many States of our Union, the admission of the parties' own books and his own entries, has been authorized and regulated by statute, as in Vermont, Connecticut, Maryland, Virginia, North and South Carolina, and some others. In almost all the rest, as in our own State, they have been admitted without statute authority, under the common law. This rule of evidence has been usually held a departure from the common law. I see not why it should be so held. Mr. Greenleaf says, in speaking of this kind of evidence: "In general, its admission will be found in harmony with the rules of the common law, the entry being admitted only when it was evidently contemporaneous with the fact, and part of the *res gesta*."—*Greenleaf's Ev. sec.* 118.

The testimony is admitted *ex necessitate rei*, and being the act of the party, should be received with great caution. The caution with which it has been admitted, is manifest in those limitations and restrictions which the courts have thrown around the rule. It is so carefully guarded that it can do no harm, and is fruitful of good, particularly to that class of small dealers whose business will not permit them to keep a clerk. The rule was at first limited to merchants and shopmen, but now embraces all persons having continuous dealings with another, and who have no other way of proving their accounts. In South Carolina, however, the books of shopkeepers, mechanics and tradesmen, are only admitted.—2 *Bay*, 173; 2 *McCord*, 328; 4 *McCord*, 76.

The objections to books of original entries, are to their competency and their credibility. They are first to be submitted to the inspection of the court, and if found free from all fraudulent appearances or circumstances, such as material and gross alterations, false additions, &c., and appear to contain the first entries or charges by the party, made at or near the time of the transaction to be proved, they are competent. If the contrary is discoverable from the books themselves, or comes out upon the examination of the party, they ought to be rejected. The credibility, both of the books and of the party, is to be weighed by the jury, and depends upon various circumstances, of which they are the judges.—2 *Mass.* 221; 13 *Mass.* 427; 2 *Conn. R.* 633; 5 *Conn. R.* 443; 12 *Johns.* 461; *Greenleaf's Ev. sec.* 118–19; *Cowen & Hill's Notes* to 1 *Phil. Ev.* 266.

From the Roman law we have borrowed the "*juramentum suppletivum*:" the suppletory oath of the party. By the Roman law, the books, regularly and fairly kept, in the usual manner, were deemed *prima facie* evidence of the justice of the claim, and the oath of the party was then admitted to make up the "*plena probatio*." So with us, when the books are found by the court to be regular and fair, by inspection, they lay the foundation for the suppletory oath. It is usual and necessary also, to require pre

from persons who have had dealings with the party, that he is in the habit of keeping correct accounts. And in some countries, as in Scotland, it is necessary to lay the foundation of all this testimony, by showing, by *aliunde* testimony, a course of dealing between the parties. Then the limitations of the rule are, that the books must appear to be the original entries of the party, made at, or nearly at the time, when the transaction to be proven occurred; so near as to be part of the *res gestæ*. The time at which the entries must be made, appears to depend very much upon the circumstances of each case. They must be free from all circumstances and appearances which indicate a fraudulent intent. They must be supported by the suppletory oath of the party, and by proof *aliunde*, that he is in the habit of keeping correct accounts.—See *Greenleaf's Ev. sec. 118-19, and notes*.

Do the facts in this case bring it within the rule? We think they do. There are no appearances on the face of the account, which make it incompetent. It is in the hand-writing of the party, and is a fair statement, in the usual manner of an account, with date, quantity, and price. The entries are proven to have been made at, or nearly at, the time that the lumber was delivered. The party kept no clerk, and these were the only entries made of the sale and delivery of the lumber. It was also proven that the plaintiff kept correct accounts.

It is objected, however, there was no book in this case of original entries proven, but only the plaintiff's bill of particulars. It is true, there was no book proven; but it was proven that the identical paper containing the account, and attached to the writ as a bill of particulars, was the original paper and entries thereon of the party; he kept no other. It is not material whether the entries be made in a book or on a separate sheet. It is only material that they be an account of the dealing between the parties, and be primary and original.

It is also objected, that a part of the entries were made, as proven by the plaintiff, from memoranda furnished him by the sawyer who delivered the lumber. The sawyer was the agent of the plaintiff for delivering it, and no more. He kept no books, but reported to the plaintiff the transactions as they occurred; and from these reports, according to the testimony, he made his entries. This fact constitutes no departure from the rule. The delivery of the lumber by the plaintiff's agent, his memoranda reported to him, and the plaintiff's entries, made at once from these memoranda, all make up the *res gestæ*. Entries transcribed from a slate have been admitted as original entries.—13 *Mass. Rep.* 428. The reason given is, that entries on a slate are mere memoranda, not designed to be permanent.

The 4th assignment of error is to the effect, that the account of original entries was improperly admitted, because it was not sufficiently proven that the plaintiff kept correct books. The evidence was, that the witnesses had dealings with the plaintiff; that they had settled with him upon presentation of their accounts; and that they found those accounts correct. The exception is, that no *book of accounts* was proven to have been correctly kept by the plaintiff. If, as we have attempted to show, it is immaterial whether the original entries were kept in a book or on a separate sheet, then it is not necessary to prove that the plaintiff kept correct accounts in a book. The object of this testimony is to fortify the evi-

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dence of the plaintiff's original entries, by showing a habit of fair dealing, in like transactions, with others, on his part. In our judgment, there was no error in the decision of the court below on this point.

Again: it is charged as error that the court instructed the jury that, if the lumber was delivered to the order of the defendant, and the bills were in writing, and they were afterwards countermanded, they were at liberty to make their own inference, as to whether they were countermanded in writing or verbally.

All the evidence relative to the countermanding the bills, found in the record, is the following, to wit: "The lumber was ordered by bills, which bills themselves were frequently countermanded, when it was found that the lumber did not suit." Whether countermanded in writing, or verbally, does not appear from the record. It was certainly the duty of the court to submit this testimony to the jury, and they were properly instructed to infer from it whether the bills were countermanded in writing or verbally. It is the duty of the jury to weigh the testimony, and apply it to the case, equitably and reasonably. It certainly is no part of the duty of the court to instruct the jury what construction they are to put upon the facts submitted to their consideration. This would be to usurp the rights of the jury. We cannot see how the defendant could be aggrieved by this charge of the court, as it seems to us to be rather in his favor than otherwise. There was no error in it.

The last assignment of error is founded on a refusal of the court to instruct the jury, as desired by the defendant, that the plaintiff could not recover more than the price of the lumber, as charged in the bill of particulars, and on the instruction of the court in fact given, to wit: "That if they believed the lumber was charged at the cash price, and the amount was presented with the expectation of its being paid when presented, and it was not paid, that they could find at the credit price, by adding it to the bill of particulars." We find no evidence in the record about the cash and credit price of the lumber, except what appears on the plaintiff's account itself: that, as it stands, is evidence; and it exhibits the price of each item, which we are left to infer is the cash price, referred to by the court. Also, it exhibits one-fourth of the aggregate sum added in one item, and this aggregate sum, with the one-fourth added, we infer is the credit price, spoken of by the court. Thus in the dark upon this point, we can only suppose that the court, in declining to charge as requested, and in charging as it did, intended to leave the jury free to consider of the account as it stood before them, and to find either the larger or less sum, as they might believe right. That is, to find the aggregate amount of the bill of particulars, either with or without the one-fourth added. Upon this view of the matter, we think the court did not err, and confirm the judgment below, upon all the points taken in the bill of exceptions.

No. 33.—HILLIARD J. REED, for the use of OSWELL HOLLEY, plaintiff in error, vs. THOMAS H. MURPHY, defendant in error.

A note, to be negotiable by endorsement, so as to give a right of action to the endorsee, in his own name, must contain negotiable words, giving it a transferrable quality. It must be payable to the payee, and to his *order, or assigns, or to bearer*, in pursuance of the statute of *Anne*.

A note, without such negotiable words, is a valid instrument, as between the original parties, and is entitled to the allowance of the three days of grace, and may be declared on, as a promissory note within the statute. But it cannot be transferred or negotiated, so as to enable the assignee to sue upon it in his own name.

This was an action of assumpsit, tried on appeal before Judge Warren, in the Superior Court of the county of Sumpter, at May Term, 1846. It was predicated upon a note, made by the defendant, payable to James C. and Jephtha B. Pickett, for \$480 00, due the 25th day of December, 1843, and endorsed by Jephtha B. Pickett to James C. Pickett, and by him to Hilliard J. Reed, the plaintiff in error. Upon the trial, the said note being tendered in evidence, the counsel for the defendant in error objected, and moved to dismiss the action, on the ground that the note aforesaid, having no negotiable words, was not by law transferable in such a manner as to vest a right of action in the plaintiff, who was the endorsee, in his own name, and insisted that the action should have been brought in the name of the original payees, for the use of the equitable owner. Whereupon, after argument, the court below sustained the motion, and rendered judgment of nonsuit. To which the counsel for the plaintiff in error excepted, and assigned for error that the court below erred in deciding that a promissory note was not, according to the laws of Georgia, negotiable by endorsement, so as to vest in the endorsee a right of action in his own name, even without words of negotiability.

HENRY K. McCAY, for the plaintiff in error.

GEO. M. DUDLEY, for the defendant in error.

By the Court—WARNER, Judge.

The only question involved in this case is, whether a promissory note, without any negotiable words in the body of it, can be transferred by endorsement, so as to authorize the endorsee to maintain an action thereon, *in his own name*. The note set out in the record, has no negotiable words upon its face. It is contended, however, that by the 25th section of the judiciary act of 1799, this note is made negotiable.—*Prin. Dig.* 426. The negotiability of instruments was discussed, and decided by this court, in the case of *Broughton vs. Badgett*, in which the construction proper to be given to the judiciary act of 1799 was considered. In that case, the question arose as to the negotiability of a bill of sale for a slave, transferred by endorsement. We will, however, consider the statute as applicable to *promissory notes*, and express our opinion thereon. By the statute of *Anne*, promissory notes, made payable to *order, or bearer*, were

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made negotiable; and by the act of 1784, (*Prin. Dig.* 570,) the statute of *Anne* was adopted as the law of this State. In order to make a promissory note negotiable, within the statute of *Anne*, it must have negotiable words on its face. It must be payable to the payee, and to his order, or assigns, or to bearer, to give it a transferable quality. Without such words, it is a valid instrument as between the parties, and is entitled to the allowance of the three days of grace, and may be declared on as a promissory note within the statute. But if it wants negotiable words, it cannot be transferred or negotiated, so as to enable the assignee to sue upon it in his own name.—3*d Kent's Com. on American Law*, 77; *Chitty on Bills*, 66; *Hill vs. Lewis*, 1*st Salk. Rep.* 132; *Burchell vs. Slocock*, 2*d Lord Raymond*, 1545; *Smith vs. Kendall*, 6 *Term Rep.* 123; *Downing vs. Backentoes*, 3*d Caines' Rep.* 137.

Let us now advert to the legislation of Georgia on the subject of the negotiability of promissory notes. By the 26th section of the judiciary act of 1797 it was enacted, "that all bonds and other specialties, and all promissory notes and other liquidated demands, bearing date since the 9th day of June, 1791, whether for money or *specific articles*, shall be of equal dignity, and be negotiable thereafter by endorsement, and may be sued by the endorser, or assignee, in his, her, or their name, any law to the contrary notwithstanding: Provided, that nothing herein contained shall prevent the party giving any bond, note, or other writing, from restraining the negotiability thereof, by expressing in the body thereof such intention."—*Marbury and Crawford's Dig.* 277. This statute altered the statute of *Anne*, in two respects. First, it made promissory notes for *specific articles* negotiable. Secondly, it made *all promissory notes negotiable*, although no negotiable words in the body of them; and authorized the endorsee or assignee to bring suit thereon in his own name against the maker. If this act of 1797 was now of force, there could be no doubt as to the right of the plaintiff, to maintain his suit as endorsee, against the defendant. But this statute of 1797 is not now of force in this State; it was repealed by an act of the Legislature, passed 16th February, 1799, entitled "an act to revise, and amend the judiciary system of this State."—*Marbury and Crawford's Dig.* 308, for the repealing clause. The act of 1799 has placed promissory notes upon a different footing, in regard to their negotiability. That act declares, "that all bonds and other specialties, and promissory notes, and other liquidated demands, bearing date since the 9th day of June, 1791, whether for money or other thing, shall be of equal dignity, and be negotiable by endorsement, in such manner, and under such restrictions, as are prescribed in the case of promissory notes: Provided, that nothing herein contained, shall prevent the party giving any bond, or other writing, from restraining the negotiability thereof, by expressing in the body thereof such intention." We will now point out the difference between the statute of 1797, and the statute of 1799. By the statute of 1797, it is declared, all promissory notes, &c., whether for money or "*specific articles*," shall be of equal dignity, &c. In the statute of 1799, the words "*specific articles*" are omitted, and the words "*other thing*" substituted in their place. By the statute of 1797 it is declared, "that all promissory notes, &c., shall be of equal dignity, and be negotiable by endorsement, and may be sued endorsee or assignee, in his, her, or their name, any law to the con-

withstanding." In the act of 1799, the words "and may be sued by the endorsee, or assignee, in his, her, or their name, any law to the contrary notwithstanding," are omitted, and the words "in such manner, and under such restrictions, as are prescribed in the case of promissory notes," substituted in their place. Now, if the Legislature intended to place promissory notes, not having negotiable words in the body of them, on the same footing in regard to negotiability by endorsement, as notes payable to order or bearer, so as to authorize the endorsee to sue thereon in *his own name*, why were the very words in the statute of 1797, placing them on such footing, and giving the endorsee such authority, *stricken out*, when that statute was amended by the act of 1799; and the words "in such manner, and under such restrictions, as are prescribed in the case of promissory notes," inserted? The answer is obvious, and the intention of the Legislature, we think, clearly manifested. The act of 1797 being repealed by the act of 1799, the statute of Anne prescribes the *manner*, and *restrictions* for the negotiability of promissory notes in this State; and that statute, as has been shown, authorizes such endorsees of promissory notes only as have negotiable words in the body of them, to maintain suits against the makers thereof in their own names. It was contended on the argument, by the counsel for plaintiff in error, that, as the defendant had not restrained the negotiability of the note, by expressing such intention in the body thereof, it must be considered as negotiable, within the proviso to the act of 1799. With equal propriety may it be said, the defendant did not intend the note should be negotiated by the payee, so as to authorize suit against him in the name of the endorsee, by *the omission of the very words necessary for that purpose*. The defendant promised to pay the *payee* of the note the amount specified therein; he did not promise to pay to the payee, or *his order*, or to the *bearer* of the note. We are therefore of the opinion there is no error in the record, and that the judgment of the court below must be affirmed.

No. 34.—JAMES S. COLLIER, administrator, *de bonis non*, of ARCHIBALD MILLS, deceased, plaintiff in error, *vs.* AUGUSTUS H. LANIER, defendant in error.

Where an instrument is drawn, and executed, which professes and is intended to carry into execution, an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement.

For the facts and grounds of error in this case, see the opinion of the Supreme Court.

JOSEPH STURGES for the plaintiff in error.

GEORGE M. DUDLEY, for the defendant in error, cited the following authorities:

1 *Story's Eq. Juris. sec.* 110, 114, 115; 1 *Peters' Rep.* 13, *et seq.*; *Gillespie vs. Moon*, 2 *Johns. Ch. Rep.* 596, 602; 6 *Ves.* 332, *Marg. p.*; 4 *Johns. Ch. Rep.* 147; 1 *Story's Eq. Juris. sec.* 152, 161, and the cases there cited.

By the Court—LUMPKIN, Judge.

This was a bill filed in Early Superior Court, in which Lanier was the complainant, and the plaintiff in error the defendant. It charged that on the 1st of January, 1841, one Archibald Mills, then in life, since deceased, was indebted to him, Lanier, on promissory notes, then in existence and unpaid, the sum of \$4,594 23 principal, besides interest on the said notes, (a copy marked exhibit A is annexed to the bill.) That the said Archibald Mills, then in life, in consideration of his said indebtedness, and for the purpose of securing to Lanier the payment of the said notes, and for no other object or inducement, conveyed to Lanier, by deed of mortgage, sundry lots of land and nine negroes, besides various articles of personal property, all particularly described in the instrument. That he, Lanier, was unskilled in the law, unused and unaccustomed, as well as Archibald Mills, to draft instruments, requiring technical exactness, or legal precision. That Mills was the writer of the conveyance, and that, owing to the inexperience and want of experience of both of them in matters of this sort, the mortgage was erroneously drawn, and insufficient in law, to answer and carry out the true object and purpose for which it was executed. That the intent was to secure the payment of the promissory notes, when the instrument, by mistake, set forth that the same was to secure the payment of a bond or obligation, held by Lanier against Mills, in the penal sum of \$10,000, bearing even date with the mortgage, and conditioned for the payment of five thousand dollars, on the 1st January thereafter: when, in truth and in fact, Lanier never held any such bond against Mills at any time, but did hold, and was then possessed of, the aforesaid promissory notes. A copy of the mortgage (marked exhibit B) is attached to the bill. It further charges that Archibald Mills afterwards departed this life; that one Stephen Mills administered on his estate, in Early county; that he, Stephen Mills, removed beyond the limits of the State, and that James G. Collier, the plaintiff in error, was appointed administrator, *de bonis non*; that twelve months had expired before the filing of the bill, and that the administrator had due notice of the demand, and that the plaintiff in error had expressed himself willing to allow the claim against the estate of his intestate, provided the mistake in said instrument, if any there was, could be rectified, he having received all the assets of the estate from the first administrator.

The bill in conclusion prays that the mistake in the mortgage, as therein set forth, may be rectified and reformed in accordance with the intention of the parties to the agreement, and that Collier may be decreed as administrator as aforesaid, to pay over the proceeds arising from the sale of the property embraced in the mortgage, or so much thereof as may be necessary to satisfy the said promissory notes.

At the appearance term of the bill, the plaintiff in error demurred thereto on various grounds, all of which were annulled by Judge Ware at the April Term, 1846, of Early Superior Court. And the only

ment of error is, that the demurrer ought to have been sustained on the first ground; that the bill contained no charge whereupon a court of equity could make a decree, as said bill charged, that, from ignorance of the law, the mortgage deed set forth in the bill was erroneously drawn, which, it is alleged by the rules of equity, is not such a mistake as could be corrected, altered or changed.

In the case of *Job Rogers, plaintiff in error, vs. Robert Atkinson and others*, (*ante* p. 12,) decided by this court at its session in Cassville, March, 1846, the doctrine, as to the power of a Court of Chancery to *reform a written contract*, was elaborately discussed; and we then announced our readiness to go to the extent of the principles laid down by the Supreme Court of the United States, in the case of *Hunt vs. Rousmaniere's* administrator.—1 *Peters' Rep.* 1-19.

Mr. Justice Washington, who delivered the opinion of the court, said: "There are certain principles of equity which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, and is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by *mistake of the draftsman*, either as to fact or law, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument, which is intended to execute the agreement, be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his agreement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement according to the terms of it, and the manifest intention of the parties."

We are of the opinion that the case before us is fully embraced in this decision. Mills, in his lifetime, is largely indebted to Lanier, by promissory notes amounting to near five thousand dollars, exclusive of interest. It is agreed between them, that the debt shall be secured by mortgage, Mills, the debtor, undertaking to draw the instrument; neither of them being skilled in the business, and through ignorance in not knowing the proper mode of carrying out their agreement, instead of inserting the notes in the deed, a bond is instituted covering the amount of the notes; which bond in reality had no existence, but was only another way of setting forth the notes. And now the bill is filed to rectify this error; the defendant himself not even denying the facts, but professing his willingness to have the mistake corrected, provided it can be legally done.

We think the case clear, and that the judgment of the court below must be affirmed with costs.

No. 35.—JONAS RACKLEY, plaintiff in error, vs. WILEY PEARCE, defendant in error.

The plaintiff had two notes of the defendant, the one infected with usury and the other not. The defendant paid \$1,800, out of which the usurious note was extinguished, and the balance applied to the note not thus tainted with usury, which was afterwards renewed at 16 per cent. In a suit upon the last-mentioned note, the usury paid upon the first cannot be withdrawn and applied as a credit under the plea of payment.

The general rule is, where there are distinct demands due by the debtor to the creditor, and a payment is made by the debtor, he has the right to direct its application; but if the debtor does not make a specific application of the payment at the time, then the right of application devolves on the creditor.

The excess of usury, over and above principal and legal interest, which was paid on the extinguishment of the first note, might have been pleaded as a set off in the suit upon the last; or it might be sued for and recovered in a separate action against the plaintiff.

This was an action of debt, brought by the plaintiff in error against the defendant, upon a promissory note for \$1,115 76, dated the 26th of January, 1842, and due the 1st of January thereafter, made by the defendant in error, and T. & W. Sanders, and being a joint and several note; the defendant in error being principal, and T. & W. Sanders securities upon the contract upon which the note was given. To which action the pleas of usury and payment were plead. The suit was brought in the Superior Court of the county of Decatur, and in that court, at the June term, 1846, the same was tried before Judge Warren, upon the issues made by the aforesaid pleadings, when the plaintiff in error, being the plaintiff in the court below, was put upon the stand as a witness to prove the usury, (in pursuance of the act of the Legislature, passed in the year 1842,) who testified that the defendant was originally indebted to him in the sum of \$2,722 37½, of which the sum of \$1,522 37½ was due on the 1st day of January, 1840, and the sum of \$1,200 was due on the 1st day of January, 1841; that the defendant paid to him (plaintiff) \$142 in January, 1840, on the note of \$1,522 37½ then due, and the balance of the same was then renewed at 12½ per cent. for the year then commencing; and that shortly after the expiration of that year, the defendant paid him (plaintiff) the sum of \$1,800, which was applied, first to the extinguishment of the renewed note, and the balance to the other note of \$1,200, which was unrenewed. The plaintiff further testified, that the note of \$1,200 remained unrenewed for one year longer, at eight per cent. interest, and was then renewed at sixteen per cent., and that this is the note sued on. The counsel for the plaintiff then requested the court below to charge the jury, that the voluntary payment of the usurious note out of the \$1,800, could not be withdrawn from it, and the balance paid on the same, over and above the amount due at the time of the first renewal, applied to the extinguishment of the note which was not tainted with that usury; which the court below refused to do, but charged the reverse, and the jury found pursuant to the charge. To which the counsel for the plaintiff in error excepted.

JOHN P. GAULDEN, for the plaintiff in error *ex parte*, the defendant in error having failed to appear, either in person or by attorney, to join issue on

assignment of errors, cited the following authorities:—*Simpson vs. Ingham*, 2 *Barn. & Cres.* 65; 2 *Saunders on Pleading and Ev.* 716; 6 *Taunton*, 495; 3 *Starkie Ev.* 1090; *Matthews vs. Welwyn*, 4 *Ves.* 118; 3 *Barn. & Cres.* 164; *Prin. Dig.* 295.

By the Court—WARNER, Judge.

The error assigned in this case is, the charge of the court to the jury. From the record, it appears the defendant, Pearce, executed to the plaintiff two notes—one of which was for the sum of \$1522 37, due 1st Jan. 1840—the other was for the sum of \$1200 00, due 1st Jan. 1841. In Jan. 1840, the defendant paid the plaintiff \$142 00 on the note then due, and renewed his note for the balance due, at twelve and a half per cent. for the ensuing year. Shortly after the expiration of that year, the defendant paid the plaintiff \$1800 00, which was applied to the extinguishment of the renewed note, and the remaining balance applied to the other note, which had not been renewed. It also appears, this last note remained unrenewed for one year longer, at eight per cent., and was then renewed at sixteen per cent., and the note now sued on, is the renewed note. The counsel for the plaintiff in error requested the court below to charge the jury, that the *voluntary* payment of the usurious note out of the \$1800 00, could not be withdrawn from it, and the balance paid on the same, over and above the amount due at the time of the first renewal, applied to the extinguishment of the note which was not tainted with usury; which charge, the court refused to give, but charged the contrary thereof. The general rule is, when there are distinct demands due by the debtor to the creditor, and a payment is made by the debtor, he has the right to direct the application of the payment; but if the debtor does not make a specific application of the payment at the time, then the right of application devolves on the party receiving the money.—*Simpson vs. Ingham*, 9th *English Com. Law Rep.* 28; *Smith vs. Screven*, 1st *M'Cord's Rep.* 368. In this case, it appears the payment was applied to the first note, which was extinguished, and the balance of the \$1800 00, after extinguishing the first note, was applied to the note now sued on. To the suit on this last note, the defendant has filed the plea of usury and payment; and the question is, whether the amount of usury which the defendant paid, over and above the principal and lawful interest due on the first note, at the time it was paid off and extinguished, could be withdrawn, and applied to the discharge of the note now sued on, under the state of the pleadings disclosed by the record. The first note was paid off and extinguished; principal, lawful interest, and the usurious interest. The party who paid it, could maintain his action against Rackley, and recover back the amount of the usurious interest so paid. Here are two separate contracts, one of which is paid off and extinguished. On what principle is it, the payment of the one can be considered as the payment of the other? If the plaintiff is indebted to the defendant for money paid to his use, which he is not entitled in justice to retain, then the defendant could either have brought his action against him therefor; or, if the plaintiff instituted a suit against him, to recover a money demand, as in this case, the defendant could have plead such indebtedness by way of set-off to the plaintiff's action, and on due proof thereof, be allowed the same. If the usurious interest, paid by the defendant

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in the extinguishment of the first note, can be withdrawn, and applied in discharge of the second note, under the plea of *payment*, what protection would the record in this case afford Rackley, in a suit by Pearce, to recover back the usury paid him on the first note? As the indebtedness of Rackley to Pearce is for usurious interest paid by the latter, for which an action might be maintained, we are of the opinion, the defendant should have pleaded his demand to the plaintiff's action by way of set-off, and that he cannot be allowed the same under the plea of *payment*.

"A set-off means a *cross-claim*, for which an action might be maintained against the plaintiff, and is very different from a mere right to a *deduction* from, or reduction of, his demand, on account of some matter connected therewith, and which may be given in evidence under the general issue, such as a payment on account, &c.—2d *Saunders' Plead. and Ev.* 786.

As there was no plea of set-off filed by the defendant, we are of the opinion, the court below committed error in refusing to give to the jury the instruction prayed for by the counsel for the plaintiff in error, and in giving the contrary instruction. Let the judgment of the court below be reversed, and a new trial granted.

No. 36.—HAWKINS H. NUNN vs. THE STATE OF Georgia.

An indictment, founded upon a presentment of the grand jury, need not be sent again before that body for its action thereon.

It is the duty of the clerk to spread out in *full* upon the minutes of the court, every presentment of the grand jury.

A law which merely inhibits the wearing of certain weapons in a *concealed manner* is *valid*. But so far as it cuts off the exercise of the right of the citizen altogether to *bear arms*, or, under the color of prescribing the *mode*, renders the right itself useless—it is in conflict with the Constitution, and *void*.

This was a bill of indictment, founded upon a presentment of a grand jury at Sumpter Superior Court, against he plaintiff in error, for a high misdemeanor, for having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known and used as a horse-man's pistol, under an act of the General Assembly of the State of Georgia, entitled "An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons," assented to on the 25th December, 1837; upon which bill was endorsed by the solicitor-general, that the same was "founded on the presentment of a grand jury."—The bill of indictment, so made out and endorsed, as founded upon presentment, &c., had not at any time been sent out to a grand jury, and found a true bill: that the only evidence of there having been a presentment made in said case was a paper, purporting to be a presentment of the grand jury for the November Term, 1844, of said court, and an entry made upon the minutes of the court for the said term, as follows, to wit:

"The State •

vs

"Hawkins H. Nunn

} HIGH MISDEMEANOR."

And the names of the grand jurors inserted in the said paper, purporting to be the presentment, were the names of the grand jurors of said term

At May Term, 1846, of said Superior Court, the said bill of indictment came on to be tried before Judge Warren; when the plaintiff in error having been arraigned, and plead not guilty by his counsel, moved to quash the indictment on the following grounds:

1st. That the before-recited statute of the State of Georgia, assented to on the 25th of December, 1837, under which said indictment was found, is contrary to, and in violation of, the Constitution of the United States of America.

2d. That said statute is contrary to, and in violation of, the Constitution of the State of Georgia.

3d. That the indictment does not show and charge that the defendant below carried the pistol, with the having and keeping of which he is charged, secretly.

4th. That there is no sufficient legal evidence of record upon the minutes of the court, at the term at which the presentment, upon which said indictment is framed, purports to have been made, that said presentment ever was in fact made by the grand jury, or delivered into court.

5th. That the bill of indictment was never sent before any grand jury for action upon it.

6th. That said statute is void for uncertainty, and for the absurdity and contradiction in its different provisions.

All of which said grounds were overruled by the court below; and the plaintiff in error excepted. George Dykes, a witness for the State, was then introduced, and proved that on the 4th day of November, 1844, the plaintiff in error, in said county of Sumpter, had a pistol in his hand, which was not a horseman's pistol, but a breast pistol. And thereupon, after argument, the judge of the court below charged the jury that the aforesaid statute was constitutional and of force, and if they believed that the defendant had the pistol, they should bring in a verdict of guilty. To which the plaintiff in error also excepted.

DUDLEY and CRAWFORD and T. C. SULLIVAN, for the plaintiff in error,

Contended, 1st. That the act of 1837; under which the indictment in this case was framed, is contrary to the Constitution of the U. S.—*Prin. Dig.* 900, 2d Amendment; *Patrol law Prin. Dig.* 774; *Militia Law U. S. Ing. Dig.* 596; *Ib. Georgia, Prin. Dig.* 588; 4 *Wheaton 2d Condensed Reps. Supreme Ct.* 326; 9 *Wheat.* 562; 1 *Ala. Rep. New Series*, 614; 2d *Litt.* 90; 3 *Blackf'd* 229.

2d. That said act is contrary to the Constitution of the State of Georgia.—*Prin. Dig.* 904; 17 *sec. 1st art. Constitution*.

3d. The indictment does not charge that the pistol was carried secretly.—*Pamphlet Laws of 1837*, p. 90; *Prin. Dig.* 774.

4th. That there was no sufficient legal evidence that the presentment had been made and delivered into court by the grand jury. Our statute requires the clerk to keep minutes of all the proceedings in the court, (*Prin. Dig.* 428,) and presentments should either be entered at full length on the minutes, or such an entry should be made as to show conclusively that the presentment had been made. Such an entry as made in this case, to wit: "*The State vs. Hawkins H. Nunn*, high misdemeanor," is insufficient.

5th. That the indictment was never acted on by the grand jury.—*Prin. Dig.* 659; 14 *division 5th sec. 3 Blk. Com.*, 4 *Com. Dig.* 645, note u.; 1 *Chit. Cr. Law* 62-3; *Stephen Crim. Law*.

6th. Said statute is void for its absurdities and conflicting provisions.—*Pamphlet Laws, 1837*, page 90.

WM. J. PATTERSON, Sol. Gen. for the State.

Before the court will declare an act of the Legislature unconstitutional, a case must be presented in which there can be no rational doubt.—1 *Ala. Rep.* 612, *New Series*; 1 *Cowen Rep.* 550; 1 *Com. Law Rep.* 146. There was sufficient legal evidence of the presentment.—4 *Phillips' Ev.* 1068–1074; *Roscoe's Crim. Ev.* 186. It was not necessary for the grand jury to act upon the bill of indictment, predicated as it was on a special presentment.—1 *Chit. Crim. Law*, 162; 4 *Blk. Com.* 301.

By the Court.—LUMPKIN, Judge.

This was an indictment for a high misdemeanor, founded upon the presentment of a grand jury in Sumpter Superior Court.

At May term, 1846, the defendant, being arraigned, pleaded not guilty, and moved to quash the proceeding on the following grounds, to wit: 1st and 2d. Because the act of 1837, under which he was prosecuted, was contrary to the Constitution of the United States and of the State of Georgia.

3d. Because the indictment does not show and charge that the defendant (below) carried the pistols *secretly*, with the having and keeping of which he is charged in the indictment.

4th. Because there is no sufficient evidence of record that said presentment ever was made by a grand jury, or delivered into court.

5th. Because the bill of indictment was never sent before any grand jury for action upon it.

6th. Because the act of 1837 is void for uncertainty, and the absurdity and contradictions in its different provisions.

All these objections being overruled by Judge Warren, they are now presented in the bill of exceptions for the determination of the Supreme Court.

The view taken by us of the first grounds submitted to our consideration, will dispose finally of this case: still, as there are several important points of practice contained in some of the other grounds, and which are properly before us, and have been fully discussed by counsel, we deem it advisable to express our opinion respecting them.

In the opinion of this court, it is not necessary that an indictment, founded upon presentments, should be referred to the grand jury for the further action of that body. A presentment is the notice taken already by the grand jury of any offence, from their own knowledge or observation, and into which it is their duty to inquire. And although the party cannot be put to answer it until it is delivered into court, and an indictment framed thereon by the proper officer, still, it is never sent back to the grand inquest to be acted on a second time.—*Burn's J. Presentment*; 1 *Chitty's Crim. Law*, 163. Neither is it indispensably necessary that the whole presentment be spread upon the minutes of the court, with the action of the jury thereon. The endorsement on the paper itself, of file in the office, or the signatures of the body, or of the foreman, in the name of himself and his fellows, aided by the testimony of the solicitor and clerk, would be sufficient. It is, however, a highly useful and safe practice, and a duty required to be performed, no doubt, by the law, that the whole presentment be put upon the minutes.

It is always with unfeigned reluctance that we approach a question involving the constitutionality of a state law. It is made our duty, how-

er, in the present case, and we should be unworthy of the exalted station we occupy, if we were to shrink from its performance.

There are certain fundamental principles appertaining to questions of this character, which should never be overlooked. I will state a few of them, and then proceed to examine the statutes in controversy.

It ought seldom or ever to be decided, in a *doubtful case*, that a law is void for its repugnance to the Constitution. And it is not on slight implications and vague conjectures that the Legislature is to be pronounced to have transcended its powers. On the contrary, the opposition between the law and the Constitution should be such, that the judges feel a clear and strong conviction of their incompatibility with each other. The presumption is in favor of every legislative act, and the whole burden of proof lies on him who denies its constitutionality. These doctrines have been repeatedly advanced by the highest judiciary in the nation.—See 6 *Cranch*, 128; 4 *Wheaton*, 625; 12 *Ib.* 436.

The act of 1837 was passed to guard and protect the citizens of the State against the unwarrantable and too prevalent use of *deadly weapons*.

Section 1st enacts, "that it shall not be lawful for any merchant or vender of wares or merchandize in this State, or any other person or persons whatever, to sell, or to offer to sell, or to keep or to have about their persons, or elsewhere, any of the herein-after-described weapons, to wit: Bowie or any other kinds of knives, manufactured and sold for the purpose of wearing or carrying the same as arms of offence or defence; pistols, dirks, sword-canes, spears, &c., shall also be contemplated in this act, save such pistols as are known and used as horseman's pistols," &c.

Section 2d, prescribes the punishment.

Section 3d, makes it the duty of all civil officers to be vigilant in carrying the act into full effect, &c.

Section 4th, disposes of the fines arising under the act, and exempts sheriffs and other officers, therein named, from its provisions while in the actual discharge of their respective duties. It then declares, *that no person or persons shall be found guilty of violating the before-recited act, who shall openly wear, externally, bowie-knives, dirks, tooth-picks, spears, and which shall be exposed plainly to view*. It allows venders or any other persons to sell any of the aforesaid weapons, which they then owned or had on hand, "till the first day of March next ensuing its date."

There is great vagueness in the wording of this statute. It would seem to have been the intention of the Legislature to make the *proviso* in the 4th section as broad as the enacting clause in the 1st. But such is not the fact. Pistols and sword-canes are inserted in the 1st, and omitted in the 4th section; and tooth-picks are mentioned for the first time in the *proviso*, in the 4th section. Were we disposed to criticise language, an ample field is here spread out before us. It might be insisted, and with much plausibility, that even *sheriffs*, and *other officers* therein enumerated, might be convicted for *keeping*, as well as carrying, any of the forbidden weapons, while not in the actual discharge of their respective duties. And yet it is hardly to be supposed, that it was expected of sheriffs, constables, marshals, overseers and patrols, to procure a new supply of arms for each successive service, and *throw them away* when it was accomplished: for they dare not sell or otherwise dispose of them

March, 1838. It is the plain and literal meaning of the act, too,

that no person should be found guilty of selling or offering to sell, or keeping or having about their persons, or elsewhere, bowie or any other kind of knives, pistols, dirks, sword-canes, or spears, *who shall openly wear, externally, bowie-knives, dirks, tooth-picks, and spears, and which shall be exposed plainly to view.* But this would be an absurdity too glaring to impute to the wisdom of that body.

What, then, is the obvious purpose of the Assembly, to be deduced from the whole act, deviating a little, as we are at liberty to do, from the literal meaning of its language, and looking to the *subject matter*, to which the words are always supposed to have regard, and the reason and spirit of the act? It *prohibits bowie-knives, dirks, spears, (and it may be, tooth-picks,) from being sold, or secretly kept about the person, or elsewhere; and it forbids, altogether, the use, or sale, or keeping, of sword-canes, and pistols, save such pistols as are known and used as horseman's pistols, &c.* Now, the defendant, Hawkins H. Nunn, was indicted and convicted of a high misdemeanor, "for *having and keeping about his person, and elsewhere, a pistol, the same not being such a pistol as is known and used as a horseman's pistol.*"

It is not pretended that he carried his weapon *secretly*, but it is charged as a crime, that he had and kept it about his person, and elsewhere. And this presents for our decision the broad question, is it competent for the Legislature to deny to one of its citizens this privilege? *We think not.*

This question has occasionally come before the courts of the Union for adjudication. In *Bliss vs. The Commonwealth*, (2 *Littell's Rep.* 90,) the defendant was indicted, on the act of the Legislature "to prevent persons from wearing concealed arms." It provides that any person in the Commonwealth, who shall, after its passage, "wear a pocket-pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when traveling on a journey, shall be fined in any sum not less than one hundred dollars; which may be recovered in any court having jurisdiction of like sums, by action of debt, or on presentment of a grand jury."

The indictment, in the words of the act, charges Bliss with having *worn, concealed as a weapon, a sword in a cane.*

Bliss was found guilty of the charge, and a fine of one hundred dollars assessed by the jury, and judgment was thereon rendered by the court. To reverse that judgment, Bliss appealed to the Supreme Court, by a majority of which (Judge Mills dissenting) the judgment was reversed.

The argument in this case turned mainly on the 23d section of the 10th article of the Constitution of Kentucky, which provides "that the right of the citizens to bear arms in defence of themselves and the State, shall not be questioned."

The attorney-general did not contend that it would be competent for the Legislature, by the enactment of any law, to prevent the citizens from bearing arms; but a distinction was taken between a law prohibiting the exercise of the right, and a law merely regulating the manner of exercising that right. And while the former was admitted to be incompatible with the Constitution, it was insisted that the latter was not so. And under that distinction, and by assigning the act in question a place in the latter description of laws, its consistency with the Constitution attempted to be maintained.

But the court say, "that the provisions of the act in question do not import an entire destruction of the right, will not be controverted; for though the citizens are forbid wearing weapons, concealed in the manner described in the act, they may nevertheless bear arms in any admissible form. *But to be in conflict with the Constitution, it is not essential that the act should contain a prohibition against bearing arms, in every possible form. It is the right to bear arms, that is secured by the Constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the Constitution.*"

"If, therefore, the act in question imposes any restraint on the right, immaterial what appellation may be given to the act, whether it be an act regulating the manner of bearing arms, or any other, the consequence in reference to the Constitution is precisely the same, and its collision with that instrument equally obvious."

"And can there be entertained a reasonable doubt, but the provisions of the act import a restraint on the right of the citizens to bear arms? The court apprehends not. The right has no limits, short of the moral power of the citizens to exercise it, and in *fact consists of nothing else but the liberty*. Diminish that liberty, therefore, and you necessarily restrain the right; and such is the diminution and restraint which the act in question most indisputably imports, by prohibiting the citizens bearing weapons. In truth, the right of the citizens to bear arms has been as directly assailed by the provisions of this act, as though they were forbid carrying guns on their shoulders, swords in scabbards, or when in conflict with an enemy, were not allowed the use of bayonets. And, if the act be consistent with the Constitution, it cannot be incompatible with that instrument for the Legislature by successive enactments to entirely cut off the exercise of the right of the citizens to bear arms. For in principle there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing of such as are exposed; and, if the former be unconstitutional, the latter must be so likewise."

The conclusion at which the court arrived was, *that an act to prevent persons from wearing even concealed weapons is unconstitutional and void.*

In the *State vs. Reid*, (1 Ala. Rep. 612,) the same question came up, but was differently adjudged; thus verifying the old truth, "*tot homines, quot sententiae*,"—so many men, so many opinions!

By the first section of the act of Alabama (passed 1838-1839) it is declared, "that if any person shall carry concealed about his person any species of fire-arms, or any bowie knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon, the person so offending shall, on conviction thereof before any court having competent jurisdiction, pay a fine not less than fifty, nor more than five hundred dollars, to be assessed by the jury trying the case; and be imprisoned for a term not exceeding three months, at the discretion of the judge of said court."

Under this section, the defendant was indicted in the Circuit Court of Montgomery, for carrying concealed about his person a certain species of fire-arms, called a pistol, contrary to the form of the statute. The defendant pleaded *not guilty*, and insisted, that the law under which he was prosecuted, was contrary to the constitution of Alabama, which declares, "that every citizen has a right to bear arms in defence of himself and the
e."—23d sect. 1st art. of the Constitution.

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Collier, Chief Justice, says: "The question recurs, does the act "to suppress the evil practice of carrying weapons secretly," trench upon the constitutional rights of the citizen? *We think not.*

The Constitution, in declaring that every citizen has the right to bear arms, in defence of himself and the State, has neither expressly nor by implication denied to the Legislature the right to enact laws in regard to the manner in which arms shall be borne.

"We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of *regulating*, amounts to a *destruction* of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional. But a law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less careful of the personal security of others, does not come in collision with the Constitution.

The same point arose in the case of *The State vs. Mitchell*.—3 *Black. Rep.* 229. There the defendant was indicted under a statute of Indiana, which is as follows: "Every person, not being a traveler, who shall wear or carry a dirk, pistol, sword in a cane, or other dangerous weapon, *concealed*, shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars."—*Laws of Indiana*, ed. of 1831, p. 192.

The court decided that this act was not contrary to the Constitution of that State, which declares that "the people have a right to bear arms for the defence of themselves and the State."

It is true, that these adjudications are all made on clauses in the State Constitutions; but these instruments confer no *new rights* on the people which did not belong to them before. When, I would ask, did any legislative body in the Union have the right to deny to its citizens the privilege of keeping and bearing arms in defence of themselves and their country?

If this right, "inestimable to freemen," has been guarantied to British subjects, since the abdication and flight of the last of the Stuarts and the ascension of the Prince of Orange, did it not belong to our colonial ancestors in this western hemisphere? Has it been a part of the *English* Constitution ever since the bill of rights and act of settlement? and been forfeited here by the substitution and adoption of our own Constitution? No notion can be more fallacious than this! On the contrary, this is one of the fundamental principles, upon which rests the great fabric of civil liberty, reared by the fathers of the Revolution and of the country. And the Constitution of the United States, in declaring that the right of the people to keep and bear arms, should not be infringed, only reiterated a truth announced a century before, in the act of 1689, "to extend and secure the rights and liberties of English subjects"—whether living 3,000 or 300 miles from the royal palace. And it is worthy of observation, that both charters or compacts look to the same *motive*, for the irrelative enactments. The act of 1 *William and Mary*, declares that it is against law to raise or keep a standing army in the kingdom, in time of peace, without the consent of Parliament, and therefore pla

the hands of the people; and our Constitution assigns as a reason why this right shall not be interfered with, or in any manner abridged, that the free enjoyment of it will prepare and qualify a *well-regulated militia*, which are necessary to the security of a free State.

I am aware that it has been decided, that this, like other amendments adopted at the same time, is a restriction upon the government of the United States, and does not extend to the individual States. The court held otherwise, however, in the case of the *People vs. Goodwin*, (18 *John. Rep.* 200) and Chief Justice Spencer, who delivered its opinion, says: "The defendant's counsel rely principally on the fifth article of the amendments to the Constitution of the *United States*, which contains this provision: '*Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb.*' It has been urged by the prisoner's counsel, that this constitutional provision operates upon State courts—*proprio vigore*. This has been denied on the other side. I am inclined to the opinion, that the article in question does extend to all *judicial tribunals*, whether constituted by the Congress of the United States or the States individually. The provision is general in its nature and unrestricted in its terms; and the sixth article of the Constitution declares, that that Constitution shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding. *These general and comprehensive expressions extend the provisions of the Constitution of the United States, to every article which is not confined by the subject matter to the national government, and is equally applicable to the States.* Be this as it may, the principle is undeniable, that no person can be twice put in jeopardy of life or limb for the same offence."

The language of the *second* amendment is broad enough to embrace both Federal and State governments—nor is there anything in its terms which restricts its meaning. The preamble which was prefixed to these amendments shows, that they originated in the fear that the powers of the general government were not sufficiently limited. Several of the States, in their act of ratification, recommended that further restrictive clauses should be added. And in the first session of the first Congress, *ten* of these amendments having been agreed to by that body, and afterwards sanctioned by three-fourths of the States, became a part of the Constitution. But admitting all this, does it follow that because the people refused to delegate to the general government the power to take from them the right to keep and bear arms, that they designed to rest it in the State governments? Is this a right reserved to the *States* or to *themselves*? Is it not an unalienable right, which lies at the bottom of every free government? We do not believe that, because the people withheld this arbitrary power of disfranchisement from Congress, they ever intended to confer it on the local legislatures. This right is too dear to be confided to a republican legislature.

Questions under some of these amendments, it is true, can only arise under the laws and Constitution of the United States. But there are other provisions in them, which were never intended to be thus restricted, but were designed for the benefit of every citizen of the Union in all parts and in all places; and the people of the several States, in ratifying in their respective State conventions, have virtually adopted them.

as beacon-lights to guide and control the action of their own legislatures, as well as that of Congress. If a well-regulated militia is *necessary* to the *security* of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the *States* to destroy this bulwark of defence? In solemnly affirming that a well-regulated militia is necessary to the *security* of a *free State*, and that, in order to train properly that militia, the unlimited right of the *people* to *keep* and *bear* arms shall not be impaired, are not the sovereign people of the State committed by this pledge to preserve this right inviolate? Would they not be recreant to themselves, to free government, and false to their own vow, thus voluntarily taken, to suffer this right to be questioned? If they hesitate or falter, is it not to concede (themselves being judges) that the safety of the States is a matter of indifference?

Such, I apprehend, was never the meaning of the venerated statesman who recommended, nor of the people who adopted, this amendment.

The right of the people peaceably to assemble and petition the government for a redress of grievances; to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; in all criminal prosecutions, to be confronted with the witness against them; to be publicly tried by an impartial jury; and to have the assistance of counsel for their defence, *is as perfect under the State as the national legislature, and cannot be violated by either.*

Nor is the *right* involved in this discussion less comprehensive or valuable: "The right of the people to bear arms shall not be infringed." The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta*! And Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans, plead eloquently for this interpretation! And the acquisition of Texas may be considered the full fruits of this great constitutional right.

We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*; and that, as the defendant has been indicted and convicted for carrying a pistol, without charging that it was done in a concealed manner, under that portion of the statute which entirely forbids its use, the judgment of the court below must be reversed and the proceeding quashed.

No. 37.—ELIZABETH GRADDY, plaintiff in error, *vs.* ELIJAH HIGHTOWER, HOLMAN F. SIMMONS, WILLIAM WISE and JOHN BUTLER, defendants in error.

In applications for new trials, a brief of the testimony, approved by the court, or agreed upon by the parties or their counsel, must be filed; and such approval or agreement, as the case may be, must be entered upon the minutes at the term at which the judgment is rendered, and the rule for new trial is applied for.

A rule *nisi* for a new trial will not be granted in Georgia at the instance of a party, unless application is first made during the term at which the judgment was rendered, and unless such application appear upon the minutes of that term.

The judges may make rules for new trials returnable in vacation, in cases where the application has been first made in term, and recorded, and where the record shows that such rule is made so returnable in vacation.

When the term of the court at which the judgment was rendered has passed, and no application made and recorded at that term, the record in the cause having been finally made up, the court has no power to grant a new trial, except in some peculiar and extraordinary cases.

This was a rule for new trial, made absolute by Judge Warren, in the Superior Court of the county of Dooly, at May Term, 1846. In the granting of which new trial, the error complained of by the plaintiff in error was assigned. The circumstances of the case, the decision of the court below, and the grounds of error alleged, are set forth in the opinion delivered by the Supreme Court, to which the reader is referred.

E. R. BROWN, for the plaintiff in error, relied upon the following authorities:

Prin. Dig. 432—New Trials; 61st Rule of Court; *Adm. of Spann vs. Exec. of Fox*, Georgia Decisions, 2—7; 1 Crompton's Prac. 328; Harrison's Dig. 2 vol. 1530; 1 Reg. Gen. K. B., M. T., 8 Geo. 4; 3 C. and P. 111; C. P. E. T.; 6 Bing. 622; 4 M. and P. 444; *Rex vs. Gough*, 2 Doug. 791; 2 Tidd's Prac., 3 Am. ed. 912—13; *Jackson, ex dem. Colden and others, vs. Chase*, 15 Johns. Rep. 354; Doug. 171; 1 Chitty's Prac. 382—3.

GEORGE M. DUDLEY, representing WARREN & SCARBOROUGH, for the defendants in error.

By the Court—NISBET, Judge.

Upon the trial of this cause in the court below, a decree was had in favor of the complainant. At the term when the decree was rendered, a motion was made by defendant's solicitors, orally, for a rule *nisi* for a new trial. What was claimed by the mover of this rule as a brief of the testimony in the case, was presented to the judge. This brief was objected to by complainant's counsel as imperfect; indeed, a protest against its completeness was formally made by them. There was, therefore, no brief of testimony, either agreed upon by the parties or approved by the court.

supersedeas was entered; the judgment was entered, and execution issued for costs, (the recovery being for land,) was paid. The

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minutes of the cause show no action whatever touching the rule *nisi*. Indeed, it was conceded that no motion in relation thereto was entered upon the minutes. The presiding judge announced that he would take time to consider of the application for the rule; and, taking the papers with him, in vacation, and some fifteen or eighteen months after the decree in the cause was rendered, granted it. This rule being made absolute, a new trial was awarded. Upon the judgment of the court, granting the new trial, errors are assigned; and it is claimed that the court erred:

1st. Because there was no brief of the testimony approved by the court, or agreed upon by counsel, filed in the cause, at the time the rule *nisi* was moved.

2d. It is claimed that the court erred in granting a new trial without any record of the application for the rule *nisi* appearing on the minutes, without a *supersedeas* being entered in the cause, and after the entire record of it had been made up; and, farther, because the rule *nisi* for a new trial was granted in vacation—the plaintiffs in error contending that such a rule can alone be granted in term.

The law of new trials is well settled in England. After general verdict in King's Bench, the practice is to move a rule for entering judgment in the cause; upon the return of which rule, and within four days after verdict, judgment is entered. The motion for a new trial must be made within four days, exclusive, after the entry of the rule for judgment. It cannot be made after the four days, even by consent of parties.—*Tidd's Prac.* 3 *Am. ed.* 912; *Doug.* 171; 1 *Chitty's Prac.* 382-3, *u*; 5 *Durn. and East.* 436.

The practice in the Common Pleas does not vary a great deal from that in Banco Regis.—*Tidd*, 3 *Am. ed.* 912, 913.

The rule is granted upon motion, and the ground taken must be supported by the oath of the party applying for it. The granting of the rule operates as a *supersedeas*.—See *Sellon, tit. New Trials*. The *Terms*, in England, continue pretty much through the year, and both the granting and return of the rule, generally, is in term time.

Although the rule as to the right of a *party* to move for a new trial is as above stated, the court may on its own motion, in peculiar and extraordinary cases, grant a new trial, after the time thus limited has transpired. This power, however, is exercised with the utmost caution and reserve.—*Tidd*, 3 *Am. ed.* 912, 913; 2 *Strange*, 845, 995; 2 *Burrow*, 1189; *Doug.* 171; 1 *East.* 146; 11 *East.* 308.

Such being the practice in England, is it in any particular varied by our own Constitution and laws? We think that so far as that practice is applicable to the somewhat different organization of our courts, it is not affected by our legislation, and that the common law as to new trials is, to that extent, of force in Georgia.

By the Constitution of Georgia, the Superior Courts are clothed with power "to grant new trials on proper and legal grounds."—*Prin. Dig.* 909. The *legal grounds*, referred to in this clause, must be construed to mean *common law grounds*, as the common law was in force in Georgia at the adoption of the Constitution. We might, therefore, say that the Constitution itself refers the superior courts to the common law as their guide in this respect.

To carry out this grant of power, the act of the Legislature,

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in 1799, provides, in the 55th section thereof, as follows: "The said superior courts shall have power to correct errors and grant new trials, in any cause depending in any of the said superior courts, in such manner, and under such rules and regulations as they may establish, and according to law and the usage and customs of courts."—*Prin. Dig.* 432. The power to establish rules and regulations is obviously controlled by the words *according to law and the usage and customs of courts*, and is limited to such rules and regulations as the courts may find expedient, and which are not in conflict with the law, and the usage and custom of of courts. By this section of the act, the courts are required to grant new trials *according to law*. What law, unless the law of force at the time of its enactment, to wit, the common law of England? And farther, according to the usage and customs of courts. What courts, unless the courts of England, acting according to the course of the common law? The courts of Georgia, at that time, had no usages and customs contrary to the usages and customs of the courts of Great Britain, relative to new trials. Our construction of this act therefore is, that it adopts the common law in regard to new trials, and empowers the courts, in addition, to establish such rules and regulations, in relation to them, as they may find expedient, and not in conflict with the common law. It was under this latter power, no doubt, that the courts established the 61st rule of court. This rule provides that "a motion for a new trial shall not operate as a supercedeas unless an order to that effect be entered on the minutes; and in every application for a new trial, a brief of the testimony in the cause shall be filed by the party applying for such new trial, under the revision and approval of the court." In our judgment, this rule does not conflict with the common law, and is a necessary and proper rule. We are farther of opinion that, inasmuch as the power to establish rules and regulations in regard to this subject matter, is expressly given to the courts by the Legislature, it has the force of law, until repealed either by the Legislature or the courts. We hold, too, that nothing short of a brief of the testimony, approved by the court, and such approval entered on the minutes, or agreed upon by the parties or their counsel, and such agreement entered on the minutes, at the term at which the rule for a new trial is applied for, will be a compliance with the 61st rule of court. As the record does not show that a brief of the testimony was so filed, approved or agreed upon, and such approval or agreement entered on the minutes, in the cause now before this court, we are of the opinion, that there is error in the record on the first ground taken in the assignment.

Applying the common law upon this subject to our own courts, we believe that in no case can a rule *nisi* for a new trial be granted in Georgia, at the instance of a party, unless application be made at the term at which the judgment of the court is rendered; and that such application must appear upon the minutes of that term. We do not deny to the judges the power of making such rule returnable in vacation, in cases when the application is duly made in term, and recorded, and when the record also shows that such rule is made so returnable in vacation. We deny the right of granting the rule after the record is made up. There must be an end to litigation. If a rule for a new trial *nisi* may be granted one day after the term, at what time in after years does the power

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fail? When shall the litigation cease. *When* may the parties be at rest, and when may their rights be considered as finally adjudicated? The cause now under review illustrates the evil of a contrary practice. Here the decree was regularly had, and judgment entered, execution issued, and was returned satisfied for costs, and the party complainant, from aught that the record reveals, in possession of the land decreed to them. The minutes show no supersedeas, no application for a new trial. The record of the cause was made up; and, fifteen months thereafter, the whole litigation is opened by a rule for a new trial, awarded in vacation. We hold it of the first importance that the record of a cause should exhibit not only a history of all judicial action thereon, but a continuous, a connected history. The world has a right to believe that a final judgment has concluded the action of the court, where nothing contemporary with it, to the contrary, is apparent from the record. This is a false and delusive conclusion, if the cause may be at any time opened by the judges granting a new trial. In consequence of the exercise of such a power, the records of our courts of justice afford no continuous proof of what has been done by the courts. The power we think unauthorized by the law, and its exercise irresponsible and dangerous in the extreme.

The 57th section of the act of 1799, appears at first view to be in conflict with the 55th section, before recited, and to oppose the conclusions we have drawn from the last-named section. It is one among many instances, to be found on our statute book, of careless or hasty legislation. No construction that we can give it will make it harmonize completely with the previous section. Both sections are found in the same act. It is, according to approved rules of construction, necessary to give effect to both sections, if possible. We cannot believe that the legislature meant, in the 57th section, to repeal, or to render inoperative, the 55th section. The 57th section is in the following words: "In any case which has arisen since the signing of the present Constitution, or which may hereafter arise, of a verdict of a special jury being given, contrary to evidence and the principles of justice and equity, it shall and may be lawful for the judge presiding, to grant a new trial before another special jury, *in the manner prescribed by this act*. Provided, that twenty days' notice be given, by the party applying for such new trial, to the adverse party of his intention, and the grounds of his application." The remainder of the section is not material to this inquiry. The provisions of the section are limited to new trials on the verdict of special juries, and seem to be limited to new trials, growing out of the finding of the jury on the evidence adduced to them. It does not in its terms relate to new trials, which may be claimed upon alleged errors in the administration of the law. In such cases, it would seem by the proviso, that a party would be entitled to apply at *any time* for a new trial, upon giving twenty days' notice to the adverse party of his intention, and the grounds of his application. This inference can be drawn alone from the proviso; it cannot be drawn from the previous part of the section. So far from it, that a contrary conclusion must be drawn from the previous words of the section. In the cases contemplated, it is made lawful for the judge presiding to grant a new trial "*in the manner prescribed by this act*," that is to say, in the *manner* prescribed in the 55th section. The *manner* prescribed in the 55th section is, as we have endeavored to show, according to the common law

and the usages and customs of the courts of England. The provisions, therefore, of the 57th section, are amenable to, and not intended to be in conflict with, the 55th section of the same act. We have seen that this last-named section, adopting the rules of the common law, regulating new trials, does not permit new trials to be awarded in vacation, except as herein-before explained. Neither, therefore, does the 57th section so permit them to be so awarded. The notice, under this view of the subject, which is required by the 57th section, relates to the time when the party (having at term regularly moved his rule *nisi*) shall apply for his rule absolute. That this construction of both sections of the act of 1799 is entirely satisfactory, we do not pretend: it is, however, in our judgment, the only fair construction which they will admit. We are, however, fully satisfied that the rules we now lay down are safe, and will avoid many evils which would grow out of the lax practice upon this subject, which has heretofore obtained in some of our courts. We believe there is error in the record, upon the second ground assigned also, and the judgment of the court below must therefore be reversed.

No. 38.—JAMES BUCHANNON and JOHN DILL, plaintiffs in error,
vs. GABRIEL JONES, defendant in error.

In an action of assumpsit for money had and received, the defendants cannot, under the Judiciary of 1799, give in evidence, under the plea of the general issue, a special contract made with the plaintiffs, exempting them from liability. This defence must be fully, plainly, and distinctly set forth, in writing, in their answer.

The decision of the court below, complained of in the bill of exceptions, was upon a motion for a new trial.

The defendant in error brought an action of assumpsit against the plaintiffs in error, in Early Superior Court, upon two general money counts: one for money had and received, and the other for money paid, laid out, and expended; to which the plaintiffs in error pleaded the general plea of *non assumpsit*. Upon the trial on the appeal, the plaintiffs in error offered in evidence, under their plea of *non assumpsit*, an instrument, of which the following is a copy:

" GABRIEL JONES, <i>vs.</i> HENRY BRITT, WM. J. CHESHIRE.	}	RANDOLPH SUP. COURT, Nov. Term, 1840.
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" GEORGIA, } Randolph county. }	}	Received the above-stated <i>fi. fa.</i> of Gabriel Jones. which we promise to pay him one-fourth the amount we can collect on said <i>fi. fa.</i> in Jos. T. Jones' notes and <i>fi. fa.</i>, so far as they are worth; the balance to be paid in John Standley's paper, or other notes as good. If said <i>fi. fa.</i> should not answer the purpose for which we have received it, we are to return it to Mr. Jones, and take up this obligation.
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(Signed)

" JAMES BUCHANNON,

" JOHN DILL & Co.,

" *per* McCURE."

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It having been previously proven, and admitted, that said instrument referred to the *fi. fa.* upon which, by the testimony in behalf of the defendant in error, it appeared the *money had and received* by the plaintiffs in error, and for which they were sued in this action, had been collected, and that it was the receipt given for said *fi. fa.* which was objected to; and the court below sustained the objection, and rejected the instrument.

Upon the trial, the special jury—the case being on the appeal—rendered a verdict against the plaintiffs in error; whereupon they moved the court below, and obtained a rule *nisi* for a new trial, returnable to the then next term of Early Superior Court, requiring the defendant in error to show cause why a new trial should not be granted, on the ground that the court below rejected the instrument so tendered in evidence, on the trial, in behalf of the plaintiffs in error, as aforesaid.

At the April Term, 1846, of the Superior Court of said county of Early, the rule *nisi* for a new trial came on to be heard, before Judge Warren; and, after argument, the court below overruled the rule *nisi*, refusing to grant any new trial in said case; to which decision of the court below the plaintiffs in error excepted; and assigned for error, that the court refused to permit the plaintiffs in error, under the general issue, in the said suit against them, to introduce in evidence the instrument aforesaid, to resist the right of the defendant in error, who was plaintiff below, to sue and recover for money had and received.

WILLIAM TAYLOR and DAVID KIDDON, for the plaintiffs in error, cited 1 *Chitty's Pl.* 475 to 479; 2 *Saunders on Pl. and Ev.* 720, 721, 722; 2 *Starkie on Ev.* 127, 128.

ISAAC E. BOWER, for defendant in error.

By the Court—LUMPKIN, Judge.

The single point presented in this case is, whether the special agreement entered into by the plaintiffs in error with Jones could be given in evidence by them, under the plea of *non assumpsit*, to screen them from accounting for the money collected by them on the *fi. fa.*, at the instance of Jones, against Britt and Cheshire.

That this could be done in England, and in those States where their pleadings are regulated by the common law, there can be no doubt; for there the general issue (*i. e.*, that the defendant did not promise in manner and form alleged by the plaintiff,) puts in issue not only the receipt, by the defendant, of the money claimed by the plaintiff, but also *the existence of all those facts* which make his receipt of it a receipt to the use of the plaintiff. But this is not admissible under our judiciary, which requires the answer of the defendant to be in writing, signed by the party, or the attorney, and to set forth *plainly, fully, and distinctly, the cause of defence*. The plaintiff, if thus put on his guard, might show that this paper was obtained by duress.

This case comes fully within the principle of *J. Johnson and E. J. Black, vs. Neil Ballingall*, decided by this court in May, 1846, at Milledgeville. (*Ante* p. 68.)

Judgment affirmed.

No. 39.—JONAS RACKLEY, plaintiff in error *vs.* THOMAS SANDERS and WRIGHT SANDERS, defendants in error.

In a suit against the security alone, the principal is interested to the extent of the costs, and therefore is not a competent witness for the security, unless released from liability as to such costs.

This was an action of debt, brought by the plaintiff in error against the defendants in error, who were liable as partners, under the style of T. & W. Sanders, upon a joint and several promissory note for \$1,115 76, made by one Wiley Pearce and the defendants, he being principal and they only securities upon the contract upon which the note was given. The note was given on the 26th day of January, 1842, and due on the 1st day of January ensuing.

The defendants pleaded usury in the contract between their principal, Wiley Pearce, and the plaintiff in error.

The suit was brought in the Superior Court of the county of Decatur, and in that court, at the June Term, 1846, the same was tried before Judge Warren, upon the issue made upon said plea of usury, when the said Wiley Pearce, the principal, who was not sued in this action, was offered by the defendants as a witness to prove the usury. The counsel for the plaintiff objected to the competency of the witness, on the ground of his being the principal in said note, and therefore liable to the defendants for the costs of the suit, and interested in preventing a recovery: Which objection was overruled by the court, and the witness was admitted and sworn: To this decision the plaintiffs in error excepted; and assigned for error that the court erred in admitting said witness, he being interested, to the extent of the costs, in behalf of the defendants, by whom he had been introduced, and had not been released by them from said liability.

JOHN P. GAULDEN, for the plaintiff in error *ex parte*, the defendants in error having failed to appear, either in person or by counsel, to join issue on the assignment of error, relied upon the following authorities:—1 *Greenleaf's Ev.* 458, 464, 465, referring to *Townsend vs. Downing*, 5 *East*, 565, 567; note to 1 *Greenleaf's Ev.* 467, referring to 7 *Taunt.* 153; also to *M. & Robinson*, 302; *Johns. Rep. Butler vs. Warren*, 57; 1 *Greenleaf's Ev.* 471, and note to p. 470; 2 *Greenleaf's Rep.* 199; 16 *Johns. Rep.* 70; 14 *East*, 565.

By the Court—WARNER, Judge.

This was an action brought on a promissory note, made by Wiley Pearce, as principal, and the defendants as his securities. Pearce was not sued in this action. The defendants relied on the plea of usury as their defence, and at the trial, offered Wiley Pearce, the principal maker of the note, as a witness to prove the usury. An objection was made to the competency of his testimony, on the ground he was interested in the result of the suit, which objection was overruled by the court, and the case examined: and the only question presented for our consideration

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is, the competency of the witness.—We are of the opinion the witness was incompetent for the defendants, without a release as to the costs of the suit, they being his sureties only.—1 *Greenleaf's Ev.* 465, section 395; *Townsend vs. Downing*, 14 *East*, 565; 2 *Greenleaf's Ev.* 167, section 203; *Hubbly vs. Brown*, 16 *John. Rep.* 70; *Edmons vs. Lowe*, 15 *English Common Law Rep.* 250; *Hall vs. Cecil*, 19 *Com. Law Rep.* 47. The judgment of the court below must therefore be reversed, and a new trial granted.

No. 40.—MARIAH L. SMITH, plaintiff in error, vs. JOSEPH B. KERSHAW, defendant in error.

A plaintiff in trover for certain slaves, required bail, under the second section of the act of 1821, entitled "An act to quiet and protect the possession of personal property, and to prevent the taking possession thereof by fraud or violence." The defendant was arrested, and the slaves seized by the sheriff under the process, and being unable to give security under the act, the plaintiff thereupon gave security under another provision of the same act, and received from the sheriff the possession of the slaves sued for, and afterwards, and without any trial, dismissed his action of trover, still retaining the possession of the slaves thus obtained. The defendant then sued the former plaintiff in trover for the same slaves, and insisted that his possession, obtained as aforesaid, was tortious:

Held, that said possession was not tortious, but was a lawfully acquired possession, under and in pursuance of the above-recited act.

This was an action of trover and conversion, for the recovery of certain slaves, at the instance of the plaintiff in error, against the defendant in error, tried before Judge Hill, presiding in the Superior Court of Muscogee county, at May Term, 1846.

The evidence disclosed in the record, and the point made and determined, being set forth in the opinion delivered by the Supreme Court, are omitted in this place. The reader is referred to that opinion for the proper information in this regard.

JOSEPH STURGES, for the plaintiff.

HINES HOLT, for the defendant.

HENRY L. BENNING, in conclusion, for plaintiff.

By the Court—NISBET, Judge.

The record in this case furnishes no evidence whatever, except as to a single point. This omission is fatal to all the points taken in the bill of exceptions, except that one. This court will not entertain a writ of error upon points which, so far as the record discloses the testimony do not spring out of the evidence or the pleadings. The certifi-

the judge, declares that the bill of exceptions is correct, and we are compelled to infer, judicially—it contains the whole record, and the whole of the evidence. If that be so, then neither the pleadings nor the evidence authorized the counsel for the plaintiff in error to ask the court below to charge as he did request it to charge. The points made in that request, and now made before this court, appear not to grow out of any pleadings, or out of any evidence in the case, but on abstract questions of law, arbitrarily presented—all, we mean to say, except one. We are furnished with a transcript of testimony, which, we are told by counsel, was had in the case; that we cannot regard, in any form or in any degree. We cannot take cognizance of any testimony whatever that is not certified to us according to law. The statute organizing this court enacts: "Said Supreme Court shall hear and determine upon matters contained in the transcript of the record of the cause, and not otherwise."—*Act of 10th Dec.*, 1845, sec. 4. So, also, the 13th rule of this court decrees that: "No cause shall be heard until a complete record shall be filed, containing in itself, without references, *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court." The 4th rule requires, in very express terms, that "a brief of the oral, and a copy of the written evidence, adduced in the court below, shall be embodied in the bill of exceptions, and shall constitute a part of the same." We are precluded, both by the law and our own rules, from entertaining any of the points presented in this cause, except one, which seems vaguely enough, it is true, authorized by the record, as it is exhibited to this court.

It is stated in the bill, "that the court was requested, by counsel for plaintiff, to charge the jury, that the defendant, having sued out an action of trover, and the property, the subject matter of this suit, being delivered to the defendant; the plaintiff now, being defendant then, being unable to give security for the forthcoming of the same; and the suit thereon having been dismissed by the plaintiff without trial; that such possession was tortious, which the court refused to do."

Upon this refusal, the plaintiff in error makes assignment of error. The question is, was the possession of the property, under the circumstances detailed in the bill tortious? We think it was not, and that the court committed no error in declining to instruct the jury that it was.

It seems that the defendant in the suit below had brought an action of trover, for the slaves in controversy, against the plaintiff below, and required bail, according to the act of 25th December, 1821.—*Prince*, 449. And the defendant in that suit, being unable to give the security required by the law, the negroes were delivered to the plaintiff in that suit, according to the provisions of the same law; he first giving bond and security for the forthcoming of the negroes, to answer such judgment, execution, or decree, as may be afterward had in the case. Thus acquiring possession, the action of trover was dismissed. Then it was that the defendant in the first suit brought her action against the plaintiff in the first suit for the same negroes; and it was upon the trial of this action that the possession, acquired, as detailed, under the act of 1821, was claimed to be tortious, and the court requested to instruct the jury accordingly. The possession, certainly, was not tortious; it was not contrary to law, but authorized by the act of 1821, and in strict conformity with its provisions.

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By that act, in case the defendant refuses to give the security which it requires, the sheriff is directed to deliver the property sued for to the plaintiff, he first giving bond and security to have it forthcoming to answer the judgment, execution or decree of the court. The possession was, then, in this case, authorized by law, and acquired by legal process. Moreover, the bond and security is intended to secure the forthcoming of the property, to answer the judgment of the court in this very case, if there should be one, in favor of the plaintiff. How, then, can it be tortious? The conversion, to maintain trover, must be wrongful. There are numerous cases in the books establishing the doctrine, that possession acquired fairly under legal process, is not a wrongful conversion.—*See Wheaton's Selwyn*, 1390 and 1396. If the taking be such as will subject the wrong-doer to an action of trespass, it is a wrongful conversion, and trover is a concurrent remedy.—*Saunders on Plea. and Evi.* 880; 3 *Wils.* 336; *Willes*, 55; *B. N. P.* 44. It surely cannot be maintained that, in this case, the defendant would be liable for a trespass. We do not mean to say, however, that, in the case before the court, trover will not lie. The statute of '21 makes the possession, which it allows, amenable to the title, when established. We only decide that the court below committed no error in declining to charge the jury that the possession was tortious. We affirm the judgment below upon this point, and dismiss the writ of error as to all the rest.

No. 41.—WM. MAHAFFEY, plaintiff in error, *vs.* HENRY C. PETTY *et al.*, defendants in error.

A brief history of the action of Assumpsit.

Assumpsit lies concurrently with *debt*—each in a very compendious form—on contracts, express or implied, for remuneration for *personal services*, as well as for all the *usual money demands*.

Different counts may be joined in *all* cases where the *same plea* applies and the *same judgment* can be rendered, and in *some* where *different pleas* are put in; provided the *same judgment* may be rendered on *all the counts*.

Simple and short precedents in Debt and Assumpsit.

By the Court—LUMPKIN, Judge.

The plaintiff filed the following declaration against the defendants, in the above case:

GEORGIA, } To the Honorable Inferior Court of said county.
Muscogee County. }

The petition of William Mahaffey shows, that Henry C. Petty, Ph^y A Clayton, Robert A. Ware, William Bilbro and John Bilbro, as c^o

ners, and all of said county, owe to, and unjustly detain from, your petitioner, the sum of eight hundred and nineteen dollars and eighty-five cents, as principal, besides interest thereon, at eight per cent. per annum, and besides thirty-four dollars and eighty-one cents as costs of suit. For that whereas, at the Superior Court of Franklin county, in Apalachicola district, of the Territory of Florida, begun and held in the city of Apalachicola aforesaid, in the district aforesaid, heretofore, to wit, on the fourteenth day of April, in the year of our Lord eighteen hundred and forty-one, before the Honorable Samuel W. Carmack, the judge of said court; your petitioner, by the consideration and judgment of said court, recovered against said defendants the sum of eight hundred and nineteen dollars and eighty-five cents, which was adjudged to him for his damages, and also recovered against said defendants his costs by him about his suit in that behalf expended; and your petitioner says that his said costs were the sum of thirty-four dollars and eighty-one cents; whereof said defendants were convicted as by the record and proceedings thereof, still remaining in said court, before the judge thereof, at the city of Apalachicola aforesaid, more fully appears; whereby an action has accrued to your petitioner, to demand and have of and from said defendants, said sum of eight hundred and nineteen dollars and eighty-five cents, besides interest thereon at eight per cent. per annum, from the day and year aforesaid, and also said sum of thirty-four dollars and eighty-one cents. And your petitioner further shows, that said defendants are indebted to your petitioner in another sum of thirty-three hundred dollars. For that whereas, heretofore, to wit, on the twenty-third day of February, eighteen hundred and thirty-nine, in consideration that your petitioner would act and serve as engineer of and on board the steamer Alabama, running on and navigating Chattahoochy river, the said defendant agreed and promised him to pay him for his services as such engineer, at and after the rate of two hundred dollars a month, for and during the time your petitioner should so serve; and your petitioner says that he did so serve said defendants as engineer of and on board said steamer for a long space, to wit, from the day and year last aforesaid, until the fifteenth day of April, eighteen hundred and forty. By means whereof said defendants became liable to pay to your petitioner, said first (in this count) mentioned sum of money, to wit, on the day and year last aforesaid. Yet said defendants, although often requested so to do, did not, nor would, pay said sum of money, or any part thereof, to your petitioner, but have hitherto wholly failed and neglected so to do; whereby an action has accrued to your petitioner, to have and demand from said defendants said last-mentioned sum of money. And for that whereas, said defendants, heretofore, to wit, on the day and year last aforesaid, was indebted to your petitioner in one other sum of thirty-three hundred dollars, for the wages of your petitioner before that time, and then due, and payable from said defendants to your petitioner, for the service of your petitioner by him before that time done and performed as an engineer of and on board of a certain steamer of said defendants, called the Alabama, and for said defendants, and on their retainer, and to be paid by said defendants to your petitioner, when they should be thereunto afterwards requested. Whereby, and by reason of said last-mentioned sum of money being wholly unpaid, an action has ac-

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crued to your petitioner to have and demand from said defendants said last-mentioned sum of money.

And for that, whereas, heretofore, to wit : on the first day of November, in the year aforesaid, in consideration that your petitioner would act and serve as engineer of, for, and on board of said steamer Alabama, plying on and navigating said river Chattahoochy ; they, the said defendants, promised him to pay him for his services as such engineer, at and after the rate of two hundred dollars per month, for and during the boating season, then immediately ensuing ; that is to say, from the said first day of November, until the middle of the Spring of the year next following ; and your petitioner says that he did act and serve as engineer of, for, and on board of said steamer Alabama, plying on and navigating said river, for a long space of time, to wit : during said boating season, that is to say, from said first day of November, in the year eighteen hundred and thirty-nine aforesaid, until the fifteenth day of April, in the year next thereafter. By means whereof said defendants became liable to pay to your petitioner said last-mentioned sum of money, to wit : on the day and year last aforesaid. Yet said defendants, although often requested so to do, did not, nor would pay to your petitioner said sum of money, or any part thereof, but have hitherto wholly failed and neglected so to do. And whereas, also, the said defendants, to wit : on the said fifteenth day of April, in the year eighteen hundred and forty, were indebted to your petitioner, in the further sum of thirty-three hundred dollars, for the work and labor, care and diligence of your petitioner, by him before that time done and performed, and bestowed in and about the business of the defendants, and for them, and at their special instance and request, and also, for divers materials, and other necessary things, by your said petitioner found, provided, used and applied, in and about that work and labor, for said defendants, and at their special instance and request, and to be paid to your petitioner, when they should be thereunto afterwards requested : Whereby, and by means of said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to your petitioner, to have and demand of said defendants said last-mentioned sum of money. Yet said defendants, although often requested so to do, have not paid your petitioner said sum or sums of money, above demanded, or every or either of them, or any part thereof, but to do so have wholly refused and failed, and still fail and refuse, to the damage of your petitioner, four thousand dollars ; and, therefore, he brings suit, and prays process may issue, requiring said defendants to be and appear at the next Inferior Court, to be held in and for said county, then and there to answer your petitioner in an action of debt.

JONES, BENNING, and JONES, Plaintiff's Attorneys.

The defendants to this action pleaded the general issue, that they were not indebted, &c., and payment. Upon the appeal trial, a verdict was found for the plaintiff for \$520 07 principal, \$211 interest, and cost of suit. Counsel for defendants moved an arrest of judgment upon the following grounds, to wit :

1st. Because the plaintiff's declaration contained counts in debt and counts in assumpsit ; which could not be joined in the same action.

2d. Because said verdict, if found upon the counts in assumpsit either of them, is increased by the finding of interest.

3d. Because it does not appear upon which of said counts—the count in debt or the count in assumpsit—the said verdict was rendered.

4th. Because said verdict is found and rendered against all of said defendants, when the record of said case shows service only as to a part of them.

This motion was argued before Judge Dougherty, in May, 1846, when it was adjudged by him, that the same be sustained on the ground of the *misjoinder of incongruous counts* in the writ, and a new trial was directed. To this decision the plaintiff, by his counsel, excepted; and we are asked to reverse it, as erroneous in law.

The motion below was no doubt well taken, provided the facts warranted it. Care should be taken by the pleader not to insert any counts that cannot be joined in the same action; and a misjoinder will be good ground for a general demurrer or an arrest of judgment on a writ of error.—2 *Bos. & Pul.* 424; 4 *Term Rep.* 34.

The general rule to be deduced from the authorities as to what forms of action may be joined together is, that when the *same plea* may be pleaded, and the *same judgment* given on all the counts of the declaration, or when the counts are of the *same nature*, and the *same judgment* is to be given on them all, though the pleas be different—as in case of debt upon bonds and simple contract—they may be joined.—*Saund.* 117, c; 1 *Term Rep.* 276, 277; *Bac. Abr.* tit. Act. in Gen.; *Com. Dig.* tit. Action G.; 1 *Chit. Plead.* 180; *Tidd. Pra.* 11. Assumpsit and debt, (2 *Smith*, 618; 3 *Smith*, 114;) or assumpsit and an action on the case, or for a tort, cannot be joined.—1 *T. Rep.* 276, 277; 1 *Vent.* 366; *Carth.* 189; 3 *B. & A.* 208. Nor assumpsit with trover, (2 *Lev.* 101; 3 *Lev.* 99; 1 *Salk.* 10; 3 *Wils.* 354; 6 *East*, 335; 2 *Chit. Rep.* 343,) nor trover with detinue.—*Willes*, 118.

We see no difficulty in the present case in rendering the *same judgment* upon all these counts. The *first* is upon a judgment recovered in Florida. The *second* is upon an agreement to pay plaintiff two hundred dollars a month for his services, as engineer in the steamer Alabama, for a specified period. The *third* is the same as the *second*, with the exception that the period of service was to be during the next boating season. The *fourth* is for wages due the plaintiff, for services rendered the defendants as engineer, and on their retainer; and the *fifth* is for work and labor, care and diligence, done and bestowed about the business of the defendants at their request, and also for divers materials and other necessary things found and provided at their request. In other words, all the remaining counts, after the *first*, are for money due for the personal services of the plaintiff, rendered the defendants, and for materials found them.

The objection is, that this cannot be done, as some of these counts are in debt, where the judgment must be for *money*; and some in assumpsit, where the recovery is in *damages*. Upon a careful inspection of the writ, we hold that there is no count in it in *assumpsit*. The line which separates *debt* and *assumpsit* is so very attenuated, that it is not always very easy to fix and define it clearly. One thing is most obvious, namely: that the pleader, with an accurate perception of what essentially constitutes *assumpsit*, has studiously avoided it. Originally, *debt* was the form of action for money demands; and *assumpsit* was not generally

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introduced as a remedy to recover money, until the latter end of the reign of *Elizabeth* or the beginning of that of *James*, her successor. It is asserted that *Slade's* case, in 4 *Coke*, is the first to be found, where the Court of King's Bench held that *assumpsit* would lie concurrently with *debt*, for the recovery of money. Since that time, it has crept into such general use, grown into such favor, that the profession begin now to conclude that *debt* will not lie in cases where, until the beginning of the seventeenth century, it was considered the only remedy.

Elementary writers, who treat of the different forms of actions, state that *debt* is by far the most extensive of those *ex contractu*. Judge Blackstone, in his Commentaries, says, that to maintain *debt*, the sum must be *certain*; and if there be no *settled amount*, *assumpsit* and not *debt* is the remedy. But such, I apprehend, is much too limited a view of this action. The better and more modern opinion is, that *debt* will lie on all the contracts, express or implied, arising out of the ordinary transactions of life. Lord Mansfield, in *Wallen vs. Wilton*, (*Douglas*, 6) says: "Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought." And Justice Buller, in the same case, observes: "that all the old cases show that whenever *indebitatus assumpsit* is maintainable, *debt* also is. Till *Slade's* case, a notion," he says, "prevailed, that on a simple contract for a sum certain, the action must be *debt*; but it was held, in that case, that the plaintiff had his election, *either to bring assumpsit or debt*. By the arguments in *Vaughan*, (101,) it seems," continued the learned Judge, "that the doctrine of *Slade's* case was not approved of at first; and from the manner in which the statute of 3 Jac. 1 c. 8 was penned, it is probable the action of *assumpsit* was not then much in use in such cases. Afterwards, however, it became very general."

Debt and *assumpsit* lie concurrently, and each in a very succinct form, for *remuneration*, for *personal service*, and for *all the usual money demands*. As I remarked before, whether the writ be actually in one form or the other, is sometimes not only *vexata*, but *vexatissima questio*. If I were asked to describe the hair-line boundary which separates the two, I should find it difficult to do it. The very thing which constitutes the essence of *assumpsit*, (i. e. the *super se assumpsit*,) it is supposed may be omitted, without prejudice to the action. It is this part of the writ which, taken from the forms when pleadings were in Latin, gives it its name, *super se assumpsit et promisit*: that is, the defendant undertook, or more literally, *took upon himself*, and promised. Strike this out, and there is scarcely a distinctive feature of the action left.

The following are simple and compendious forms in *assumpsit* and *debt*: "For that whereas, heretofore, to wit: on the ———, the defendant was indebted to your petitioner two hundred dollars, for services as an engineer on a steamboat, then rendered by your petitioner, to the said defendant, as will appear by the annexed bill of particulars, and at his request. And afterwards the said defendant, in consideration of the premises, then *promised* your petitioner to pay him the said sum of money on request."

"For that, heretofore to wit, on the ———, the defendant was indebted to your petitioner two hundred dollars for services as an engineer on a steamboat, then rendered by your petitioner to the said defendant

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will appear by the annexed bill of particulars, and at his request, to be paid for by the defendant to your petitioner on request; whereby, and by reason of the non-payment thereof, an action hath accrued to your petitioner to have and demand the said sum of two hundred dollars."

Here it will be perceived that the shade of difference is so slight, that it would perplex the most dextrous draftsman to say which was *debt*, and which *assumpsit*; and yet these precedents will abide the most searching scrutiny. Had the declaration been demurred to on the ground that, under the judiciary of 1799, the common counts could not be recovered on, it would have been a very different thing. Lord Holt is reported to have said, that he was a bold man who first ventured on these general counts. But this attempt evidences, certainly, a much more striking display of courage under *our judiciary*. But no objection was taken to the suit on that account.

Holding, then, as we do, that all the counts in the declaration are in debt, there would seem to be no defect in the verdict of the jury. Were it otherwise, the motion in arrest of judgment was sustained on the single ground of the misjoinder of incongruous counts. We are left to infer, therefore, from the record, that the other grounds were overruled. At any rate, if the court below expressed no opinion upon them, we have no right to do so.

Judgment reversed.

No. 42.—JAMES S. WATSON and WILLIAM C. WATSON, *per prochain ami*, plaintiffs in error, vs. JOHN H. WATSON and B. W. WALKER, executors of JAMES C. WATSON, deceased, *et al.*, defendants in error.

The estate of a guardian, who dies chargeable to his wards, is liable and bound therefor, before any other debt, though such other debt may have been prosecuted to judgment against the guardian, in his lifetime.

This was a bill in equity, filed by the plaintiffs, by their next friend, James A. Slaton, in Muscogee Superior Court, against Watson and Walker, executors of James C. Watson, deceased, and divers others, who were judgment creditors of said deceased. The bill sets forth that the complainants are the minor children of William C. Watson, deceased; that James C. Watson, the defendants' testator was, about the 5th of March, 1833, by the Court of Ordinary of Muscogee, duly appointed the guardian of the complainants, and as such he took possession of their estate; that said James C. Watson, guardian, as aforesaid, in pursuance of leave by the said court of ordinary, on the 1st January, 1836, sold the specific property of the complainants—lands, negroes, &c.—and converted them into cash, to the amount of about seven thousand six hundred dollars; that he continued to act as guardian of the complainants until the spring of 1843, when he died, indebted to the complainants, his wards, about \$16,000 00,

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and leaving his estate chargeable for that amount to the complainants, as his wards, as aforesaid.

The bill further sets forth, that the said James C. made a will, appointing four executors, of whom only the defendants, Watson and Walker, qualified. The bill further states that, previously to the death of the said testator, Farish Carter and Michael J. Kenan, executors, &c., and divers others, whose names and residences are set forth in the said bill, as defendants, obtained judgments, and caused executions to issue against the said James C., defendants' testator; and that, since his death, and before the qualification of the said Watson and Walker as executors, and also before they had actual possession of his effects, the said judgment creditors had levied their said executions on the real and personal estate of the said James C., defendants' testator; that the estate levied is all within the jurisdiction of the court, of which the said James C. died possessed, and that it is insufficient to satisfy the demands of the complainants against said estate; that the estate of said James C. is insolvent. The bill further states, that the order of the court appointing the testator guardian of the complainants, as also the bond by him then given, have been destroyed by fire, and that the complainants do not know who the securities were; and, also, that the order granting leave to sell has been burned. The bill then concludes with a prayer that Watson and Walker, executors of James C. Watson, complainants' former guardian, may be compelled to account; and that sufficient of the estate of their testator may be decreed to be sold to satisfy the demand of the complainants; and that Farish Carter and Michael J. Kenan, and the other judgment creditors, may be enjoined and restrained from further proceedings against said property levied on. The bill was sanctioned, and, after several continuances and terms, given to perfect service, at May Term, 1846.

Several of the judgment creditors demurred to the complainants' bill, on the ground that they were not entitled to the relief or discovery prayed; which said demurrer, after argument, was sustained by the court below, and the injunction dissolved, and the bill was dismissed as to the said judgment creditors. To which decision the complainants excepted.

ALFRED IVERSON and JAMES JOHNSON, for the plaintiffs in error.

The court erred in dismissing the bill, because the statute compels executors to pay out of the estate of testator so much as shall appear to be due to the orphans of whom testator was guardian, before any other debt of testator.—*Hotchkiss*, 485.

The statute prescribes the order in which debts of the testator or intestate shall be paid by the executor or administrator, and postpones judgments to certain debts therein described.—*Hotchkiss*, 485.

See construction of the statute, *R. M. Charlton's, Rep.* 26.

This construction sustained. See following cases and authorities.—2 *Bacon's Abr.* 436; 2 *Wms. on executors*, 719; 17 *Sergt. and Rawle*, 328; 2 *Devereaux*, 21; 9 *Wendell*, 456; 4 *Dallas*, 450; *Bur. Rep.* 246.

An English statute (see 2 *Wms. on executors*) prescribes that debts due by overseers and officers to friendly societies shall be first paid.—See *adjudications*, 6 *Ves.* 98, 441, 804; 15 *Ves.* 281.

The act of Congress gives to the United States priority of payment.—See the act; *Conard vs. Ins. Co.*, 1 *Peters*, 438, and construction in the 6 following pages:—*Thellusson vs. Smith*, 2 *Wheaton*, 396; 4 *Wheaton*, 108; 2 *Cranch*, 421; 3 *Cranch*, 73.

HINES HOLT and HENRY L. BENNING, for the defendants in error,

In support of the decision of the Court below, cited the following authorities: *Prince Dig.* 233, 435; *Toller's Law of Exrs.* 258, note 1; 2 *Cranch's Rep.* 358; 3 *ib.* 73, (90, 91;); 2 *Wheaton*, 396, (426;); 1 *Peters' Rep.* 386, (431;); 1 *McCord's Chan. Rep.* 466, citing 1 *Dess.* 456; 3 *Dess.* 530; 4 *Ves.* 538, 638; 1 *J. Ch. Rep.* 305; 4 *ib.* 619, 643; 2 *McCord's Ch. Rep.* 416; 1 *ib.* 167.

By the Court—WARNER, Judge.

The main question made on the argument of this cause, for the consideration of the court, was as to the construction which should be given to the fifth section of the act of 18th February, 1799. The fifth section is in the following words: "When any guardian, executor, or administrator, chargeable with the estate of any orphan, or deceased person, to him, her, or them committed, shall die so chargeable, his, her, or their executors, or administrators, shall be compellable to pay out of his, her, or their estate, so much as shall appear to be due to the estate of such orphan, or deceased person, before any other debt of such testator or intestate.—*Prin. Dig.* 233. It is insisted for the defendants in error, that, inasmuch as the creditors of General Watson obtained their judgments against him, prior to his death, a lien was thereby created on his property, by virtue of the 26th section of the judiciary act of 1799, which declares: "All the property of the party against whom such verdict shall be entered, shall be bound, from the signing of the first judgment," &c.—*Prin. Dig.* 426. At the time of Watson's death, no levy had been made on the property; but the defendants in error contend, such judgment creditors are entitled to be paid out of the property now in the hands of his executors, in preference to the claim of the complainants in the bill, who are the plaintiffs in error; because a lien was created in their favor, under the judiciary act of 1799. In support of their position, the defendants in error rely mainly on the case of *Conard vs. The Atlantic Insurance Company*, (1 *Peters' Rep.* 386,) and other cases, decided by the Supreme Court of the United States, giving a construction to the priority act of Congress, passed in the year 1799.

Without questioning the authority of any of the cases cited at the bar by the counsel for the defendants in error, our judgment must be controlled by the clear intention of the Legislature of Georgia, to be gathered from the several enactments to be found on the pages of our statute book. By the act of 18th December, 1792, (*Prin. Dig.*, 228,) it is declared, the debts due by any testator, or intestate, shall be paid by executors and administrators in the order following, to wit: "Funeral and other expenses of the last sickness; charges of probate and will, or of the letters of administration; next debts due to the public; next judgments, mortgages, and executions, the eldest first; next rent; then bonds or other obligations; and lastly open accounts." It appears from the record in this case, the property levied on is all that belongs to the testator's estate, within the jurisdiction of the court; and it further appears, his estate is insolvent. The position of the defendants in error goes to the extent, that a judgment obtained against the testator in his lifetime, would be entitled to seize the property in the hands of his executors, and apply the proceeds of the sale

under execution, in satisfaction thereof, in preference to the funeral, and other expenses of the last sickness, charges of probate, and *debts due to the public*; because a *lien* was created on the property by the judgment, prior to the death of the testator, by the judiciary act of 1799. Such has not been the contemporaneous construction given to the acts of 1792 and 1799 by the courts of this State, so far as we know or believe. The judiciary act of 1799, which creates the supposed lien, was passed on the 16th day of February of that year. The act, under which the plaintiffs in error claim *priority* of payment, was passed during the same session of the Legislature, on the 18th day of February, 1799; two days after the enactment of the judiciary act. The defendants in error, however, seek to derive some assistance from the act passed 13th December, 1810, (*Prin. Dig.* 535,) which declares, in substance, the same as the judiciary act of 1799, "that all the property belonging to the defendant or defendants, shall be bound and subject to the first judgment or judgments, obtained in either of the Superior, Inferior, or Justices' Courts of this State." We do not think this latter statute at all conflicts or interferes with the act of 18th February, 1799, under which the plaintiffs in error claim *priority* of payment. Before the passage of the act of 13th December, 1810, the rule was unsettled whether judgments obtained in the Justices' Courts of this State, or in the Inferior Courts, although of equal or older date with judgments obtained in the Superior Courts, stood on the same footing, as regarded the right to claim money in the hands of sheriffs, coroners, or constables.

This act was passed for the purpose of settling a *definite rule* on that subject, as its title purports. It is entitled, "An act to point out a *regular and definite rule for the priority of judgments, obtained in the several courts in this State.*" The conflict was mostly in regard to judgments obtained in Justice's Courts, where there was *no verdict of a jury*, as mentioned in the judiciary act of 1799; and the act of 1810 was intended to place all judgments on the same footing, whether obtained in the Superior, Inferior, or Justice's Courts. All judgments obtained in either of the aforesaid courts, bind the property of the defendants for the payment of the debt, so as to prevent an *alienation* thereof by him. But the title to the property continues in the defendant, notwithstanding the rendition of the judgment, until seizure and sale, in the manner pointed out by law. When, therefore, the judgments were obtained against Watson in his lifetime, all his property was bound for the payment thereof, so far as to prevent an alienation of the same by him, according to the true intent and meaning of the judiciary act of 1799. Two days after the Legislature had passed the judiciary act of 1799, binding the property of the defendant for the payment of the judgments which might be rendered against him, the same body thought it necessary to enact another statute, entitled, "An act, for the better protection and security of the rights of orphans and their estates." To accomplish this very desirable object, so creditable to the heads and hearts of our legislators, they declared: "When any guardian, executor, or administrator, chargeable with the estate of any orphan, or deceased person, to him, her, or them committed, *shall die so chargeable*, his, her, or their executors or administrators *shall be* compellable to pay out of his, her, or their estate, so much *shall appear* to be due to the estate of such orphan or deceased per-

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before any other debt of such testator or intestate." Notwithstanding the Legislature had bound the property of the defendant, by the judgment for the payment of the debt, so as to prevent its *alienation* by him; yet it doubtless occurred to their minds, that such defendant might be a guardian, executor, or administrator, and might *die chargeable as such*; and, therefore, made provision for just such a case, by declaring, so much as shall appear to be due such orphan, or deceased person, should be paid out of the estate of such testator or intestate, *before any other debt*. We cannot for a moment suppose the Legislature intended to be so inconsistent as to declare the amount due the estate of the orphan should be paid *before any other debt* of the testator, or intestate, when his whole estate was liable at the same time to be appropriated towards the satisfaction of the judgments. Such a construction would be very far from protecting and securing the *rights of orphans, and their estates*. Admit the act of 18th Feb. 1799, is *inconsistent* with the act of 16th Feb. 1799; the former being the later statute, must prevail; but we think such a construction can be given to them, as to enable both to stand, and effect the intention of the Legislature.

The 36th section of the judiciary act of 1799 was evidently intended to bind the property of the defendant for the payment of the debt, and to prevent an alienation thereof by him, to defeat such payment. The 5th section of the act of 18th Feb. 1799, was intended for the protection of the estates of orphans, when any guardian, executor, or administrator, should die, chargeable with such orphans' estate in his hands. In order to give effect to this last act, a particular state of facts must exist. The deceased must have been a guardian, executor, or administrator, and must have *died chargeable* with the estate of an orphan or deceased person, to him committed.

Now, the record in this case shows the judgments were obtained against Watson in his lifetime, and of course bound his property, as we have already shown, according to the provisions of the judiciary act of 1799, and had he have lived, the 5th section of the act of 18th February, 1799, never could have applied to him, or his property; but the moment he *died chargeable*, as the record states, *as guardian* of the plaintiffs in error, in the sum of \$16,000 00, the act does apply, and declares their claim shall be paid in preference to *any other debt*. The defendants in error are judgment creditors, who did not have their judgments satisfied out of the property of the deceased, in his lifetime. The plaintiffs in error are orphans, who allege the deceased was their guardian, and *died chargeable as such* to them in the sum of \$16,000 00, and that the estate of Watson is *insolvent*; that the property in the hands of his executors is not sufficient to pay their claim, and pray their demand against Watson's estate may be paid before any other debt, out of the property now in the hands of his executors. We are of the opinion, the intention of the Legislature is too clear, and the words of the act too plain, for us to entertain any doubt upon this question. The act declares the claim of the plaintiffs shall be paid *before any other debt of the testator*. Judgments are *debts of record*.—2 Bl. Com. 511.

It was urged at the bar that, in the lifetime of Watson, the judgment creditors could have proceeded to levy upon, and sell, this identical property, now in the hands of his executors, in satisfaction of their debts;

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therefore, they were entitled to the same rights now. The counsel for the defendants in error seem to overlook the fact, that the *title* to the property was in Watson at the time of his death, although they might have divested the title, by levy and sale in his lifetime; yet, failing to do so, the same is now assets in the hands of his executors, and the sovereign power of the State has declared the manner in which those assets shall be disposed of, he having *died chargeable as the guardian of the plaintiffs in error*. With equal propriety could the defendants in error contend, they would have been entitled to have had their judgments satisfied out of the property of the testator, in preference to a debt due the State, although the act of 1792 expressly declares, *debts due the public shall be paid before judgments*. The only difficulty in the way of the defendants in error is, that Watson died before their judgments were collected, and he died *chargeable as the guardian of the plaintiffs in the sum of \$16,000 00*; then comes the act of 18th Feb. 1799, which declares their claim shall be paid, *before any other debt of the testator*. This statute, in our judgment, is founded on clear equity. The record, in this case, shows that Watson, as the guardian, sold the land and negroes of the plaintiffs, and mixed the proceeds thereof with his own estate. If he had not sold their property, but held it as their guardian, the judgment creditors could not have sold it in satisfaction of their judgments. The estate of Watson having been increased, to the extent of the value of their property, sold by him as their guardian, it is nothing but sheer justice, the claim of the plaintiffs should be first paid out of it, before any other debt. We are, therefore, of the opinion the court below committed error in sustaining the demurrer to the complainant's bill, and dismissing the same. Let the judgment be reversed, and the cause reinstated.

No. 43.—JOHN JOHNSON, County Treasurer, plaintiff in error, vs. the STATE OF GEORGIA, *ex relatione*, T. A. BRANNON, former sheriff of Muscogee county, defendant in error.

The writ of mandamus is grantable at any time, either in vacation or in term, upon proper cause shown.

In all cases, however, where the parties' rights may depend upon an issue of fact, the writ must be made returnable before the judge in term.

The law organizing the Inferior Court, constitutes five justices the court. The concurrence of a majority of the whole number of justices is therefore necessary to the validity of their action.

The Inferior Court has no power to rescind an order drawn by it on the county treasurer for money.

This cause came before the Supreme Court, upon the transcript of the record and bill of exceptions, from the Superior Court of the county of Muscogee.

It appeared that the Inferior Court of the county of Muscogee, sitting for county purposes, on the 31st January, 1846, passed the following order, viz. :

"Ordered, that the county treasurer pay to T. A. Brannon, former sheriff of said county, the sum of six hundred and six dollars and eight cents, as per account rendered for the year 1845, out of any money in the treasury."

A copy of said order, duly certified by the clerk of said court, was delivered to said Brannon, and by him presented to the said John Johnson, the county treasurer, for payment, who refused to pay the same. The relator thereupon applied to the Honorable Robert B. Alexander, judge of the Chattahoochy circuit, for a mandamus *nisi* at chambers, and the writ was issued accordingly against the county treasurer, and made returnable before the judge in vacation. Upon the return of the writ, and before answering, the respondent, by counsel, moved to quash the writ, upon the ground that the judge had no power to issue the writ, and make it returnable before him in vacation. This motion the judge overruled, and the plaintiff in error excepted.

The plaintiff in error then returned, as a reason and justification for his refusal to pay said order, that the Inferior Court in vacation had passed an order, rescinding their first order, three justices presiding, and two of them only concurring in the order to rescind. Also, a further order, passed at a regular meeting of the court, directing the plaintiff in error not to pay the order first made in favor of the relator. After argument had, the judge overruled the return of the plaintiff in error, and made the mandamus absolute against him. To which decision of the court below, the plaintiff in error excepted. Upon these two exceptions, error was assigned.

JAMES JOHNSON, for the plaintiff in error.

The mandamus *nisi* is defective and irregular.—3 *Chitty's Practice*, 89, 6 *Term Rep.* ; *Dudley's Rep.* 221.

The court will set aside and quash irregular process.—4 *Cowen*, 73 ; 7 *East.* 345 ; 5 *Stewart and Porter*, 402.

The court erred in making the mandamus peremptory, there being no legal right as against treasurer.—10 *Wend.*

HINES HOLT, for the defendant in error,

On the 1st point, cited *Prin. Dig.* 909–10–11 ; *Constitution*, 419, 420, 421, 440, 441, 438, 618.

And on the question whether mandamus was the proper remedy, cited *Prin. Dig.* 185 ; *Dudley's Rep.* 37 ; 6 *Johns. Rep.* 279 ; 12 *Ib.* 414 ; 19 *Ib.* 259 ; 3 *Ib.* 247 ; 1 *Strange Rep.* 42.

By the Court—NISBET, Judge.

A mandamus *nisi* was issued by the judge of the Circuit Court for the county of Muscogee, in favor of T. A. Brannon against John Johnson, the county treasurer, for the purpose of enforcing payment of the following order, to wit :

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"Ordered, that the county treasurer pay to T. A. Brannon, former sheriff of said county, the sum of six hundred and six dollars and eight cents, as per account rendered for the year 1845, out of any money in the treasury." The writ was issued and returned before Judge Alexander at chambers, in vacation. Upon the return, and before answering, the respondent, by counsel, moved to quash the writ, upon the ground that the judge had no power to issue and make it returnable before him in vacation. This motion the judge overruled, and upon this judgment error is assigned; the plaintiff in error alleging, that the judge of the Superior Court has no power in Georgia to issue the writ of mandamus, or to make it returnable before him in vacation. This was formerly a prerogative writ, but is now a writ of common right. The citizen is entitled to it in all cases where he has a perfect legal right, and no adequate and specific remedy for its enforcement.—*Bac. Abr.*, title *Mand.* It is the duty of the court to grant it, yet it is also its duty to permit the party called upon to show cause against it. It is not pretended that in this case it was not the proper remedy to compel payment of the order. By the Constitution of Georgia, the judges of the Superior Courts, or any one of them, shall have power to issue writs of mandamus, prohibition, &c.—*Const.* art. 3, sec. 7; *Prin.* 911.

The manner and time of exercising this power is not prescribed by statute, and we are therefore remitted to the common and statute law of England, as of force at the time of our adopting statute for our guidance in this particular. We have no doubt of the power, according to the common law, of the judges to issue this writ at any time in vacation, but believe that, in general, it must be returnable in term. We are not inclined to favor the idea, that the judges may give judgment upon any question involving facts, in vacation, unless the power be expressly conferred by statute.

In England, the writ of mandamus, when the defendant resided above forty miles from London, was, by a rule in King's Bench, returnable within fifteen days from the time it bore teste; if less than forty miles, then within eight days.—2 *Salk.* 434. Under other circumstances, no rule as to the time of its return appears to have been established. As the terms of the courts in England occupy the greater part of the year, it would there subject the parties to no inconvenience to have these writs returnable within the terms.

Formerly the answer or return of the respondent was not traversable, and the relator was left to his action on the case for damages for a false return. Now, however, by statute of 4 *Anne*, the return to the writ may be traversed; and this right of traversing is in lieu of an action for false return. Upon the issue made, the jury are to inquire of the damages as part of the charge. Since this statute, in cases to which it applies, proceedings by mandamus are in the nature of an action, pleadings therein being admitted. By the 6th sec. of the statute of *Anne*, the respondent is allowed time to make a return, plead, reply, rejoin or demur. This statute does not extend to all cases; and in all cases to which it does not extend, the proceedings were according to the course of the common law, until the statute of 1 *William* 4 extended its provisions to all writs of mandamus except as to certain cases therein specified.—*Wheaton's Selwyn*, 1115. I refer to these statutes to show, that proceedings by r

damus are in the nature of an action, to which the respondent may plead, and upon which issue may be joined. The statute of *Anne* is in force in Georgia. Under these English statutes, the issues of fact are triable by a jury. By the statute of 38 *Geo.* 3, it is made the duty of the court, at the instance of either party to a writ of mandamus, to direct the issues made thereon to be tried in the adjoining county, and to award a writ of *venire facias* accordingly.—*Tidd's Prac.* 724.

Now, in England, the writ of *venire facias* is always at the command of the court; a jury may be summoned at any time. It is not, therefore, on account of the traverse being triable by a jury, indispensable in England, that the writ be returned in term. But how is it here? By common law, by statute of *Anne*, in force in Georgia, by the Constitution of the State and of the United States, the citizen is entitled, as well in the case of a mandamus, as in any other case, to the trial by jury. Can he enjoy this right upon a mandamus, returnable before a judge in vacation? Can the judge in vacation summon and empanel a jury? We know of no such general power. The statute of the State prescribes the manner of summoning and empanneling grand and petit jurors; and where a jury is authorized in any special proceeding, the manner of assembling it is specially designated. The judge can command a jury for the trial of an issue on mandamus, only in term; and for this reason, we are of opinion, that in all cases of mandamus, where the parties' rights may depend upon an issue of fact, the writ must be made returnable before the judge in term. There was therefore error in the court below, in not quashing the writ, according to the motion of the respondent's counsel.

The return exhibited an order of the Inferior Court, passed in vacation, rescinding their first order; also a further order, passed at a regular meeting of the court, directing the treasurer not to pay the order first issued in favor of the relator. The second in the series appears, by the record, to have been concurred in by only two justices of the Inferior Court, three being present. This order, for this reason, we hold to be a nullity, and was properly disregarded by the judge. The law, organizing the Inferior Court, constitutes five justices the court. We hold the concurrence of a majority of the whole number necessary to the validity of their action.

It was claimed by the respondent, that the order directing him not to pay the sum due by the first order to the relator, was a conclusive bar to a recovery upon it. We do not so think. The relator had no notice to appear and resist it. The first order was evidence of a just claim; the court could not at will recall it. A right of action accrued thereon in favor of the holder against the drawers or their legal agent. They occupy the position and hold the relations of any other drawers of such a paper, and could not discharge themselves by subsequent action, to which the relator was not a party. The court, through the respondent, were entitled to such defences against the claim as any other party to such an instrument would be entitled to make. Nor would the treasurer be loser: for if judgment passes against him, having made such defences as the law allows, it would be a protection against liability over to the court. It is the judgment then of this court, that the decision of the Circuit Judge, on first assignment of error, be reversed, and affirmed on the second.

No. 44.—FRANKLIN A. NISBET, plaintiff in error, vs. JAMES LAWSON, defendant in error.

An appeal may be taken from a confession of judgment, reserving the right of appeal, as well as from the verdict of a jury.

The recognizance of appeal need not be attested by the clerk.

It is not the duty of the clerk to certify the day on which the court adjourned, in sending up the appeal. It will be presumed, unless the contrary appear, that the appeal was entered within the four days after the adjournment of the court at which the verdict was obtained.

The entry on the bench docket, of two general continuances, without anything appearing on the minutes of the court, will not work a discontinuance of a cause, so as to entitle the defendant to a judgment of *non pros.*, under the law and the rules of practice in this State.

If the clerk send up the original papers, together with a certified copy of the appeal bond, it is a compliance with the act which requires him to *transmit the appeal*.

An appeal may be entered by the attorney of record. The law does not require that the party appealing should sign the bond. He must pay costs, and *give security* for the eventual condemnation money. His signature to the bond is only necessary, therefore, to signify his assent to the appeal. If put there by the attorney at law, he will be bound by the bond, if he subsequently recognize and ratify the act.

A declaration, seeking to charge an attorney, on a promissory note placed in his hands for collection, must either allege that he received the money, or that the debt was good, and a reasonable time had elapsed, and that it had not been collected and paid over, or that the claim had been lost by neglect, or want of professional skill.

An endorser on a note is an *incompetent* witness, on the score of *interest*, to prove the payment of money by him to the attorney of the plaintiff, in an action against the attorney, unless released.

An agent of an insurance company may maintain an action in his own name, on a note belonging to the company, provided it be endorsed in blank, or made payable to bearer. Nor can the title of the holder of a negotiable note be questioned, unless the defence *makes it necessary*.

An agent has no right to direct the payment of his principal's money to his own debt. And if the attorney of the principal pays money collected for him, to the debts of the agent, knowing that the funds belong to the principal, it will not be a good discharge.

In an action of assumpsit, by the principal against his attorney, for money had and received, the measure of damages is the amount of money collected, with interest thereon, from the time it was demanded, or from the date of its reception, if the attorney has failed to give notice to his client, or willfully misapplied or appropriated the money to his own use.

For the facts and grounds of error taken in this case, see the opinion of the Supreme Court.

His Honor Judge NISBET gave no opinion in this case, the plaintiff in error being a relative.

JAMES JOHNSON, for the plaintiff in error.

The appeal should have been dismissed.—*Hotchkiss*, 600; rule of court, 6 *Johnson Rep.* 296; 1 *Chitty's Pl.* 523; *Tidd's Prac.* 626; *Ala.* 98, and 395; 1 *Strange*, 492.

The court erred in ruling Grimes competent.—1 *Campbell*, 251; 10 *Purdon*—137.

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The court erred in charging that an agent might sue in his own name.—*Chitty Pl. 2*; 2 *Stewart and Porter*, 134; 12 *Johnson Rep.* 1; 1 *Peters' Rep.* 46.

The court erred in charging the jury in reference to the powers of a general agent.—2 *Kent*, 613; 3 *Term.* 757; 5 *Peters*, 292.

The court erred as to the allowance of interest, and the form of the verdict.—*Hotchkiss*, 395; *Ib.* 598.

A. H. COOPER, for the defendant in error.

1st. The court below committed no error in overruling the motion to dismiss the appeal.—*Hotchkiss' Dig.* 600, 682; *Rules Superior Court*, title *Appeals*; *Best on Presumptions*, 78, 79; 10 *Johns. Rep.* 220; 12 *Ib.* 316; 3 *Stewart*, 23; *Com. Dig. Attorney B.* 1, 20.

2d. The court committed no error in overruling the demurrer to the second count in the declaration.—2 *Chit. Prac.* 342, *et seq.*; *Saunders on Pl. and Ev.* 130, 131.

3d. That the witness Grimes was competent, his interest, if any, being equally balanced.—*Birt vs. Kershaw*, 2 *East*, 456; *Ilderton vs. Atkinson*, 7 *T. R.* 476; *Woodhull vs. Holmes*, 10 *Johns. Rep.* 231; *Waters vs. Burnet*, 14 *Johns. R.* 362. See also, *Fleming vs. Gilbert*, 3 *Johns. Rep.* 528; *Edmonson vs. Machell*, 2 *Term. Rep.* 4; *Edwards vs. Evans*, 3 *East, R.* 455.

4th. An agent for hire or reward, may maintain an action in his own name, especially when the contract is made directly with him.—*Chit. on Con.* 230; *Story on Agency*, 393, 396 *et ref.*; *Gardiner vs. Davis*, 2 *Carr. and P.* 49.

5th. That a general agent cannot direct the money of his principal, to his, the agent's, own debts.—*Story on Agency*, 127, 138; *Kinne's Law Compendium*, 1845, tit. *Agent*; *Maans, vs. Henderson*, 1 *East's, Term. R.* 335.

6th. The verdict of the jury in assumpsit, for money had and received, is for damages; and the measure of damages is the principal sum received, with interest thereon, from the time of the demand.—*Prin. Dig.* 427, 294; 6 *Wheel. Com. Law*, 215.

By the Court—LUMPKIN, Judge.

This action was originally brought in the Inferior Court of Muscogee county, by James Lawson, against Franklin A. Nisbet, to recover an amount collected by him, as an attorney, on a note made by William B. Phillips, dated March 25, 1841, for one thousand dollars, payable, sixty days after its date, to the order of William C. Gray, at the Chattahoochy Railroad and Banking Company of Georgia, with interest from date, endorsed by Gray, and also by Greenwood & Grimes.

The defendant pleaded *non assumpsit*, payment; and, further, that the money had not been demanded of him before suit brought.

The plaintiff confessed a judgment to the defendant, *reserving the right of appeal*; and thereupon did appeal to the Superior Court.

At May Term, 1846, Judge HILL presiding, a verdict was rendered for the plaintiff.

At the trial of the cause, and before the same was submitted to the jury, the defendant moved to dismiss the appeal, on the following grounds, to wit:

1st. That the appeal was not taken from the verdict of a jury, but from a confession of judgment, reserving the right of appeal.

2d. That the bond was not attested by the clerk, as required by the rules of court.

That it did not appear affirmatively, that the appeal was taken *ur* days after the adjournment of the court below.

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4th. That it appeared to the court, (which was admitted by the plaintiff,) that, for the last two terms of this court, no judicial action was had in the case, and that therefore the case was discontinued.

5th. That it did not appear by the certificate of the clerk, that the whole proceeding below was transmitted to this court—the clerk certifying the bond alone.

6th. That the appeal bond was void, because it had been executed by the attorney of record, and not by the party himself.

The court overruled the motion to dismiss the appeal, and thereupon the defendant excepted.

The defendant then demurred to the second count in the declaration, and the demurrer, having been heard, was overruled, and thereupon the defendant excepted.

The cause was then submitted to the jury, on the issues joined between the parties. The plaintiff offered, first, in evidence, a declaration filed in the Inferior Court of Muscogee county, by Nisbet, as attorney; in which said Lawson was plaintiff, and William C. Gray defendant. The writ set forth, as the foundation of the action, the same note for the collection of which the plaintiff sought to make the defendant chargeable; and averred, that it was endorsed by Gray to Greenwood & Grimes, and by them to Lawson. The declaration was signed by Nisbet, as attorney for Lawson, the present plaintiff, and the judgment was duly entered up in his favor. The original note, as described in the writ, was also given in evidence to the jury.

The plaintiff then introduced Grimes, one of the endorsers on the note, to prove the payment of the money due thereon to Nisbet.

The defendant moved the court to exclude his testimony from the jury, on the ground that he was incompetent, being interested in the event of the suit. But the court overruled the objection, and admitted the witness to testify, and thereupon defendant excepted. Grimes, being sworn, testified, that he was one of the firm of Greenwood & Grimes, who endorsed the note, on which the money was alleged to have been collected. The original note being shown him, he further testified, that in 1842, he paid on the note eight hundred dollars to Nisbet, which amount he (Nisbet) admitted was the balance due on said note, after applying the proceeds collected by defendant, of notes placed in defendant's hands by witness, and including the eight hundred dollars, and the proceeds of the notes placed in defendant's hands by witness, he paid defendant about eleven hundred dollars. Witness stated that he had several conversations with defendant on the subject. Being cross-examined, he testified that defendant stated that he received the note, alleged to have been collected, of one Gambrill, and that he considered it Gambrill's note and property.

Plaintiff swore Phillips, the maker of the note. He testified that he was master of a boat, and had sold some goods, damaged on his boat; and that the note in question was given by him, and endorsed for, and on account of, the property so sold by him, for the benefit of the indemnities of the policy of insurance, covering the goods damaged, and was in discharge of his liability for the goods so sold. That the note was made for an insurance company in New York; that the plaintiff in action was the secretary of said insurance company; that Gamb

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the cashier of the bank specified in the note, and that Lawson was not present when the note was given; and that Gambrill managed the whole matter in taking the note. The underwriters were not specified. The plaintiff introduced A. H. Cooper, who testified that he had acted as agent of plaintiff, demanded the money of defendant some six months before suit brought, that defendant refused to pay him the money, stating that it was a contest between him and one McCay, as to who should have the money. That he, the defendant, received the note of Gambrill, and had paid the proceeds thereof to Gambrill's creditors.

After the plaintiff rested his cause, and after argument had been had by the parties to the jury on the issues, the counsel for the defendant having insisted, in his argument, that no person but the individual in whom was the legal right to the money could maintain the action, the court charged the jury that such was the law; but that, if Lawson was the agent of the insurance company, for hire or reward, and though the money sued for might belong to the insurance company, yet he, Lawson, being an agent for hire or reward, might well maintain this action in his own name. To which charge, so given, defendant excepted. The defendant then requested the court to charge the jury, that if they should believe, from the testimony, that Gambrill was the general agent of the plaintiff, in reference to the note made by Phillips, and placed in defendant's hands, that the said Gambrill might well direct the application of the money collected thereon; and that if Nisbet paid the money collected thereon to any person under the order of Gambrill, that he, Nisbet, might well do so, and that it would be a good discharge. The court refused to give the charge as requested, but charged that Gambrill might have been the general agent of the plaintiff; yet, being his agent, he had no right or power to order the payment of the money collected to demands against him, Gambrill; and that if Nisbet paid the money under such directions from Gambrill, with the knowledge that Lawson was the owner of the note collected, he was not thereby discharged, but was still liable. To the refusal of the court to charge as requested, and to the charge as given, the defendant excepted. The court charged the jury, that if they should find for plaintiff, they should return a verdict for so much as damages, and that the measure of damages in the case was the amount of money collected by the defendant and interest thereon, from the time of the demand made on him for the money, and that the verdict should be for such entire sum, and not so much principal and so much interest. To which charge, so given, the defendant excepted.

The first ground of complaint is, that the court did not dismiss the appeal, *because* it was not taken from a verdict; the bond was not attested by the clerk; it did not appear when the appeal was taken; it did not appear when the appeal was transmitted; the suit was discontinued; the appeal was entered by the attorney at law.

We see no sufficient reason for overturning a well-established and convenient practice in all the circuits in the State, in allowing appeals to be taken from *confessions* as well as verdicts, where the right to do so is *expressly reserved*. It saves time to the court, and costs to the parties; and the agreement of record, that it may be done. And it will not do that it is absurd to litigate further, when the party has confessed a debt against himself. He confesses *sub modo* only. It is a condi-

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tional or qualified, and not an absolute confession, and he is entitled to the benefit of the *terms stipulated*. And as to the bond not being attested by the clerk, the law does not require that it should be. The statute is, that the party dissatisfied may, within four days after the adjournment of the court, enter an appeal in the clerk's office of such court, (as *matter of right*,) provided the person so appealing shall, previous to obtaining such appeal, pay all costs which may have accrued on the former trial, and give security for the eventual condemnation money. The law does not even direct that a *bond* be given at all, much less prescribe the method of executing and attesting it. The rules of court, it is true, contain the form of the recognizance upon appeal to be taken by the clerks; and direct that the same be entered upon the minutes of the court, and attested by the clerk. And this is a very proper practice; still, if the party aggrieved, within four days after the court, comes forward, claiming a rehearing, and pays all costs, and gives security for the eventual condemnation money, whatever else may be omitted in the proceeding, upon compliance with these prerequisites, he is entitled to an appeal, *as matter of right*.

It is alleged, however, that it does not appear that the appeal was entered within four days after the adjournment of the court; that is, that the papers transmitted do not show *that* the recognizance bears date within four days from the adjournment. It is not necessary, we apprehend, that this fact should appear on the face of the papers. The clerk of the Inferior Court, in the present case, sent up the original papers, and a certificate of the appeal bond. It was no part of his duty to certify as to the time when the Inferior Court adjourned. We must presume that he knew his duty, and did it, and that he would not permit an appeal to be entered after the expiration of the time allowed by law for that purpose. If the defendant intended to object to the regularity of the appeal, it was competent for him to furnish proof as to the date of the adjournment, and upon production of this evidence, he would be in order to move to dismiss the appeal.

When an appeal is taken from the Inferior Court, it is the duty of the clerk thereof, to *transmit such appeal to the clerk of the Superior Court of the county in which the verdict shall be obtained*. In this case, the original papers are sent up, with a certified copy of the appeal bond: and this is a substantial compliance with the law.

It is admitted, and the record establishes the fact, that two successive terms elapsed without any action being had in the cause. And it is now insisted, that this is, by legal intendment, an abandonment of the suit. By the rules of pleading, if the plaintiff, after issue is joined, neglect to bring such issue on, to be tried in *due time*, as *limited by the course and practice of the court in the particular case*, he is adjudged not to follow or pursue his remedy as he ought to do; and thereupon a *non prosequitur* is given against him for this default. The rule then must be taken with the limitation which accompanies it, namely: where the party is *guilty of delays against the rules of law*. Continuances with us are regulated by law and the rules of court; each party—plaintiff and defendant—is entitled to *one* continuance only on the *first* trial; and *three*, at *most*, on the *appeal*; and the last of these must be for *providential cause*. In this is found a sufficient security against unnecessary delay. A

rate, it would have to appear that the *default* in the present case had been contrary to the rules of law in this State, before judgment could be given against the plaintiff, as in case of nonsuit. Besides, it is the practice at present, in England, to refuse the judgment of *non jurors* for failure to file the declaration, replication, or other subsequent pleading, until a demand thereof is made in writing of the plaintiff, to *speed the cause*. And the settled practice of our courts has been, to grant an order nisi, before allowing judgment of *non pros.* to be signed. The truth is, that the suit was continued *generally* by the court, for two successive terms; and the presumption is, by the consent of *both* parties; but the entry does not appear upon the minutes, but upon the bench docket only.

It is further urged, that the attorney at law had no power to enter this appeal for his client. The rules of court, under which this appeal was entered, expressly authorized the appeal to be entered by the party in person, or by his attorney at law, and we believe the rule to be in accordance with the law. Upon general principles, it might well be doubted, whether the power to defend a cause would authorize the attorney to execute an appeal bond, which would bind his client, without his subsequent ratification of the deed. But under our statute, authorizing an appeal, it would seem to be unnecessary for the party himself to execute the bond. His signature to it is well enough, to signify his assent to the appeal, and thus to give jurisdiction to the appellate court. But the main object of the bond is, and the only one contemplated by the act, to make the appellee *secure* in recovering his demand; and if competent securities are obtained, this purpose is just as well answered without the party as with him. The *first verdict binds his property*. And this view is fortified by the construction put on the English statute, which requires the party to enter into recognizance, in order to stay execution upon writ of error brought.—*Barnes vs. Buhwer*, Carth. 121; *Good title vs. Bennington*, Barn. 75. If an attorney is warranted by his general retainer to bring a second suit on a note, after being *nonsuited* in the first, (*Scott vs. Elmerdene*, 12 Johns. Rep. 318,) and confess judgment without the will and consent of his client, and on whom process had not even been served (*Gray vs. Gray*, 2 Roll. Rep. 62; *Denton vs. Noyes*, 6 T. R. 296); surely he had the power to signify the assent of his client to carry up this case by appeal; and even to make him responsible upon the recognizance, the client having fully adopted the act as his own.

We are of the opinion, therefore, after a careful examination of the record, that the court below committed no error in overruling the motion to dismiss the appeal.

The defendant demurred to the second count in the declaration, for insufficiency, which is in the following words: "And for that whereas, also, heretofore, to wit: on the sixth day of July, in the year eighteen hundred and forty-one, to wit, in said county, in consideration that your petitioner, at the special instance and request of said defendant, had then and there retained and employed the said defendant, as an attorney, solicitor, and counselor, in the several courts of law and equity in the said State of Georgia, for certain reasonable fees and reward, to be paid by your petitioner to the said defendant, and had also then and there authorized and empowered, the said defendant in like manner, to sue for, and collect, a certain debt then due and owing, from one William

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B. Phillips and William C. Gray, and certain persons, under the name and description of Greenwood and Grimes, to your petitioner, on a promissory note, bearing date the twenty-fifth day of March, in the year eighteen hundred and forty-one, made by the said William B. Phillips; whereby he, the said Phillips, promised to pay to the order of the said William C. Gray, sixty days after the date thereof, one thousand dollars, at the Chattahoochy Railroad and Banking Company of Georgia, with interest from the date thereof, for value received; which said note the said Gray afterwards, to wit, on the day and year last aforesaid, endorsed and delivered the same to the said Greenwood and Grimes, who then and there also endorsed and delivered the same to your petitioner; and to obtain satisfaction and payment of said debt from them, the said Phillips, Gray, Greenwood, and Grimes, he the said defendant undertook, and then and there faithfully promised your petitioner to render a just account to your petitioner, for all monies and securities for money, which he the said defendant should receive for and on account of such debt; and to pay and deliver all such money and securities to your petitioner, when he, the said defendant, should be thereunto afterward requested. And although the said defendant did afterwards, to wit, on the sixth day of July, in the year eighteen hundred and forty-one, receive a large amount and sum of money, under and by virtue of the said employment and authority, for and on account of said debt, to wit, the full sum of principal and interest due upon said note; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and defraud your petitioner in this behalf, hath not rendered a just and reasonable account, or any other account, to your petitioner, of the money so received by him, the said defendant, or any part thereof; although to do this, he, the said defendant, was afterward, to wit, on the day and year last aforesaid, and oftentimes thereafter, requested by your petitioner; but so to do, the said defendant has hitherto refused, and still refuses, to the damage of your petitioner two thousand dollars."

It would appear, really, that the objection to this count should have been for *redundancy*, instead of *deficiency*; and that the sin of the draftsman was that of *commission*, rather than of *omission*. An attorney who takes a note to collect, is chargeable in one of three ways. Either that he has received the money, and failed or refused to pay it over; or else, that he might have made it, and that a reasonable time has elapsed for that purpose, and that he has neglected to do his duty; or, that the debt has been lost by unskillfulness. This court proceeds upon the first assumption, i. e., that the debt has been collected and withheld, after being demanded. It was not necessary that the plaintiff should have averred, that the defendant was retained for reward. It was enough to have set out, that he was retained as an attorney, which of itself implies a consideration.—2 *Lord Raym.* 909; 5 *Tr. R.* 143; 2 *Chitty's Rep.* 312. It was superfluous, also, to allege that the defendant promised to account for the moneys which he collected. His professional obligations imposed this duty, and created this liability, independent of any contract to that effect. Nor is it altogether certain that it was requisite to have set forth a demand before suit brought. When an attorney receives the money of his client, it is his duty to remit it to him forthwith, or give him notice its collection. But if he neglects to give this information, and has

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verted the money to his own use, or otherwise applied it illegally, I should be inclined to hold, that he would subject himself to suit, without demand previously made. In *Taylor vs. Bates* (5 Cow. 376), and other reported cases to be found in the books, it has been decided that an attorney was not liable for money collected, till demand made, or directions to remit. But in all such cases, it will be found that no *laches* are shown on the part of the attorney; that he has manifested a willingness to pay, by giving notice to his principal of the receipt of the money, and only waited for orders to pay over or account.

We are, consequently, of the opinion, that this count is *full to overflowing*; and further, that, if it were more imperfect than the defendant charges it to be, its faults, in fact or in form, would be abundantly covered and cured by the verdict.

It is further argued, that *the court erred* in not withholding from the jury the testimony of Grimes, one of the endorsers on the note; and this point is by no means free from doubt. In the examination which I have made, I find one adjudication in favor of the admissibility of Grimes. In *Gifford vs. Coffin*, (5 Pick. Rep. 448,) it was decided, that in an action against an attorney, to recover money collected by him of the plaintiff's debtor, (the identical case before us,) the debtor was held to be a competent witness to prove that he had paid the money to the attorney. WILLIAMS and WARREN cited *Browne vs. Babcock*, 3 Mass. Rep. 29, and *Ludlow vs. The Un. In. Co.* 2 Sergt. & Rawle, 119, in support of the competency of the witness. By reference to these cases, they do not sustain the principle contended for. In the first, it was ruled, that a consignee of goods on his own account, refusing to receive them, and afterwards selling them, as agent for the consignors, is a competent witness for the consignors, in an action by them against the purchasers, for the price of the goods. Chief Justice Parsons, in delivering the opinion of the court, shows that the witness, if interested at all, was called to testify against that interest. But he insisted that, in fact, he had no interest; for, if the defendant should pay the money to him on his account, he would then be chargeable to the plaintiffs, as for money received to their use; and if the money is not paid to him, the plaintiffs can have no action against him for the price of the goods.

The doctrine, in the Pennsylvania case, was, that a witness, who is liable to an action by the party for whom he is called, in case that party should not recover, *but who is protected from such an action by the statute of limitations, is competent.*

And in the main case of *Gifford vs. Coffin*, in which these authorities are adduced, the court say: "The witness states that he paid the note, and that it is given up to him. This discharges his interest in the suit." Here the possession of the note by the witness is a fact and feature, perhaps, which would distinguish this *short* case from the one at bar. At any rate, in the absence both of argument and authority, we are not satisfied to follow it as a precedent.

In *Fuller vs. Wheelock*, (10 Pick. 137,) the Supreme Court of the same State (Mass.) decided, that a person who had been authorized by the plaintiff to receive the money, due to the plaintiff from the defendant on an account, and who had given the defendant a receipt for the amount, was incompetent, by reason of interest, to prove that no money had been

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paid to him ; and that the exception, in regard to *agents*, founded upon considerations of necessity and great public convenience, for the sake of trade and the common usages of business, did not apply to one who was called to testify to facts out of the usual and common course of business.

One of the main reasons relied on, for the exclusion of the witness, was, " that, if the plaintiff failed in that suit, he would have an immediate action against the witness, for money had and received ; *an action which a recovery in this suit would bar.*"

Precisely so here ; if Lawson failed against Nisbet, he would be entitled to maintain his action against Grimes, as an endorser on the note ; and the right of action would be taken away by a recovery against Nisbet, *whether the money was collected or not* ; for the record would show, (and the plaintiff would be bound by his admissions in the writ and the judgment thereon,) that the attorney of the plaintiff had already collected the debt of some of the parties to the paper. It would seem, therefore, that the interest of the witness was direct and immediate in the event of the suit.

In a suit, by the holder of a promissory note, against an individual, upon his guaranty of the debt, the *endorser* is not a competent witness for the plaintiff ; *for if the endorsee should fail in his suit upon the guaranty, the witness would be liable upon his endorsement.*—2 Phil. Ev. note 93 ; *Mott vs. Hicks*, 1 Cow. Rep. 513.

And I apprehend it will be found in most, if not in all the cases, where witnesses have been admitted to testify, who were *apparently interested*, either that they had no interest in fact, or else that their interest was equally balanced ; and that, without a release, it would, as a general rule, be found unsafe to permit a witness to discharge himself from liability, by fixing that liability upon the defendant, in the present action. There is much pith in the rule, as laid down in the old authors, upon this head of evidence. " Now, where a man who is interested in the matter in question, would also prove it, it is rather a ground for distrust, than any just cause of belief ; for men are generally so short-sighted, as to look at their own private benefit, which is near to them, rather than to the good of the world, which is remote ; therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it ; it is also easy for persons who are prejudiced or prepossessed, to put false and unequal glosses upon what they give in evidence ; and therefore the law removes them from testimony, to prevent their sliding into perjury ; and it can be no injury to truth, to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief. No man can be a witness for himself, who is interested in the matter in question ; but he is the best witness that can be against himself."—*Peake's Law of Evidence*, 122.

The only remaining inquiry upon this branch of the exceptions is, *whether*, independent of Grimes's testimony, there was sufficient evidence before the jury to warrant the verdict ? In the statement of facts which I have already submitted, I took occasion to include a brief of the evidence, foreseeing that it would become important in the connection. It is needless to recapitulate it. Grimes is the only witness who proves the amount of money paid to Nisbet. And without this, there is nothing to sustain any of the counts in the declaration. And as Grimes

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an incompetent witness, and the other testimony does not justify the verdict, it must be set aside, and a new trial granted.

There are yet several questions, growing out of the charge of the judge, of more or less weight, which we are compelled to dispose of, as they will likely arise again in the future trial of the cause. And one is, whether or not Lawson, as the agent of the insurance company, could maintain an action on the note in his own name? It is in vain to undertake to harmonize the authorities on this subject; they are quite irreconcilable, and so admitted to be in *Dugan vs. The United States*, 3 *Whea. Rep.* 172. The property in this note was originally in an insurance company in New York. Lawson, the plaintiff, was the secretary of the company; that, as agent of the owners for collection, he had a right to sue thereon in his own name, is, we believe, the general and better doctrine.—13 *East's Rep.* 135; 12 *Mod. Rep.* 193; 6 *Carr. and Payne*, 70; 9 *Bar. and Cress.* 208; 9 *Mass. Rep.* 423; 7 *Pick.* 40; 15 *Martin Rep.* 291; 3 *Wheat. Rep.* 172, 180; 25 *Wend. Rep.* 416; 2 *Ter. Rep.* 313. In *Story on Agency*, sec. 228, it is said, that the title of the holder, in cases of negotiable instruments, is derived from the instrument itself; and that negotiable instruments, when endorsed in blank, (*as was the case here*,) or payable to bearer, are a sort of currency, and pass in the market without inquiry as to the title of the holder; and the negotiability of all instruments would be greatly impaired, if not wholly destroyed, by a different doctrine.

And again: the same author, in his work on bills of exchange, sec. 224, says: "Every party endorsing a bill, either in blank or in full, and without restriction or qualification, thereby passes the interest and property in the bill to the endorsee, if he take it for value. If he take it as agent, he has an election to treat it as to the other parties to the bill, either as his own property, or as that of his principal; but as to that of the latter, (the principal,) the endorsement creates no property whatever in him, (the agent,) and the principal may revoke the authority, and reclaim the bill from him as long as it remains in his possession.—*Chitty on Bills.* ch. 6, pp. 255, 256, 260, 268, (8th ed. 1833,) *Ib.* ch. 9, pp. 428, 429; *Bayley on Bills*, ch. 5, sec. 2, pp. 132, 133, 143, 144, (5th ed. 1830;) *Ib.* ch. 10, p. 445; *ex parte Baldwin*, 19 *Ves.* 232. And this text, the editor, in a note, thinks contains the true principle, although he admits there is some discrepancy in the authorities.

The contrary doctrine will be found strongly stated in some of the authorities referred to by the learned counsel for the defendant in error, particularly in the cases of *Bryant vs. Owen*, 1 *Porter's Rep.* 201; *Gilmore vs. Pope*, 5 *Mass. R.* 491; and in *Thatcher vs. Winslow*, 5 *Mason's Rep.* 58; *Gunn vs. Cantine*, 10 *John. Rep.* 387; and *Sherwood vs. Roys*, 14 *Pick. Rep.* 172, not noted on counsel's brief.

In this conflict of law we shall hold, that the agent of a negotiable note, payable to bearer or endorsed in blank, may sue thereon, in his own name, as may all others who are in possession of such paper—possession being presumptive evidence of title. And that the right of the plaintiff can only be questioned, when it becomes necessary for the purposes of defence. And, consequently, that the court below was right in ruling, that Lawson, as the agent of the New York Insurance Company, had the right to maintain this action in his own name.

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The defendant then requested the court to charge the jury, that if they should believe, from the testimony, that Gambrill was the general agent of the plaintiff, (Lawson,) in reference to the note made by Phillips and placed in defendant's hands, that then said Gambrill might well direct the application of the money collected thereon; and that if Nisbet paid the money to any person, under the order of Gambrill, that he, Nisbet, might well do so, and that it would be a good discharge. The court refused to give the charge as requested, but charged, that he, Gambrill, might have been the general agent of the plaintiff; yet, being his agent, he had no right or power to order the payment of money collected to demands against him, Gambrill; and that if Nisbet paid the money under such directions from Gambrill, with the knowledge that Lawson was the owner of the note, he was not thereby discharged, but was still liable.

The charge given, as above stated, and the refusal of the court to give the instructions as required, are assigned as causes of error.

It is undeniably the privilege of either party to claim from the judge trying the cause, the benefit of his instructions to the jury. And if they are *not given or wrongfully given*, and the jury should err, and find for the other party, a new trial ought to be granted, if injustice has been done. Courts should be cautious, however, lest they be circumvented themselves, and mislead the jury. And if counsel ask for the statement of an abstract principle, the judge in submitting it should so qualify it, as to prevent the jury from supposing that it necessarily applies to the case of him who calls for it. The instructions prayed, should always have reference to the state of the pleadings, and of the evidence before the court.

Now, what was the actual testimony, to which this charge had reference? That Nisbet had collected the money on Phillips' note, and paid it to the creditors of one Gambrill. Counsel for the defendant prayed the court to instruct the jury, that if Gambrill was the general agent of *Lawson*, he had the right to direct Nisbet, the attorney of *Lawson*, to pay the fund over to any third person, and that such payment would be a discharge to him. As a general proposition, this might be true. But did the facts authorize the instructions prayed for? Certainly not. And the Judge was right in refusing to submit the abstract principle, in a form which might induce the jury to believe that it could, by any possibility, be the law of the present case. The judge, therefore, very properly states the point in the only way in which it could be of any practical purpose, and charges the jury, that if Nisbet paid the money to the *creditors* of Gambrill, knowing at the same time *that it belonged to Lawson*, it would not protect him from liability to *Lawson*, notwithstanding he was authorized to do so by Gambrill, the agent of *Lawson*.

We are satisfied, then, on a full view of the case, that the Circuit Court was right in withholding the instructions prayed for. Nor are we less clear upon the other branch of the complaint, namely, that he committed no error in charging the jury as he did.

Admitting that Gambrill was the general agent of *Lawson*, in respect to Phillips' note, how would *third persons* be affected by it? The utmost, then, that could be pretended is, that persons dealing with him would have a right to consider him clothed with all the power usually accompanying such an employment. Even under this view of it, it would be exceed-

ingly doubtful whether Nisbet would be warranted in applying the money to the agent's debts. But the plaintiff's case goes much further. It brings home actual notice to Nisbet—notice upon the assumption in the charge. And it is well settled that the authority of a *general* agent, will not protect third persons *with knowledge*. Neither public policy nor sound ethics require that he should be protected as an *innocent* person, who *knows* that the agent is abusing his trust, and misapplying his principal's money. "The agent has no right to change the security of his principal for the debt, or to make himself the debtor to the principal, for the like amount, in lieu of the person who owes the debt, without the consent of the principal, expressed or implied, to that effect. Thus, for example, if an agent has authority to receive for his principal a debt due from a third person to him, and the agent owes the like amount, or greater, to such third person, he has no right to substitute himself as debtor to the principal, giving him credit for the amount, or to set off the debt due by him to such third person, against the debt due by the latter to his principal."—*Story on Agency*, sec. 413. If Gambrill himself, the supposed agent, could not do this, Nisbet, the employee, or substitute of Gambrill, could not for him.

"So, upon similar grounds, the rights of third persons will be protected when they deal with an agent, supposing him to be the sole principal, *without any knowledge* that the *property* involved *belongs to another person*. If an agent, employed to collect money and to remit it to his principal, should lend it to a third person, to whom he is indebted in a larger amount, the latter, *if he has no knowledge* that the money does not belong to the agent, may retain it as a set-off, in a suit at the instance of the agent, on account of his individual transactions with said third person."—*Ibid.* 444.

A factor cannot pledge the goods of his principal for his own debt.—*Paterson vs. Tash*, 2 Str. 1178; 5 Term Rep. 606.

A broker has no lien on a policy, for the general balance of his own account with the agent, *if he knew at the time* that the policy was effected for another person.—2 East, 523.

If the agent discloses his principal at the time, it is clear that he cannot pledge the property of such principal to another, with whom he is dealing, for his own private debt. Suppose the agent had said to the defendants: "It is true, I am agent for another, but nevertheless you may retain the money due to him for my debt." Could such a transaction be sustained? But that which is now contended for, is, in effect, the same thing.—*Per Lord Kenyon, C. J., in Mauns vs. V. Henderson*, 1 East, 338.

We concur, then, with the court below, that if Nisbet paid the money collected on Phillips' note to the creditors of Gambrill, (as he admitted he did to Cooper,) with the knowledge that Lawson was the owner thereof, (and this was a matter of fact, to be found by the jury from the filing of the writ by Nisbet in Lawson's name, and recovering judgment thereon in his behalf, and other circumstances,) he was not *thereby* discharged, but was still liable.

The last point which we are called upon to notice is, was there *misdirection* in the judge in charging the jury that, if they found for the plaintiff, they should return a verdict for so much damages; and that the

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measure of damages in this case was the amount of money collected by the defendant, and interest thereon from the time it was demanded; and that the verdict should be for such sum entire, and not for so much principal and so much interest?

This opinion has already been necessarily extended to such great length, on account of the *number*, to say nothing of the *weight* of the questions involved, that we shall be compelled to abridge *this*, as we have done many other portions of it.

The *verdict* is, in all cases of *assumpsit*, found for *damages* sustained by the plaintiff in consequence of the breach of the promise of the defendant, whether it was express or implied.—2 *Tuck. Com.* 160.

In all actions which sound in *damages*, the jury seem to have a discretionary power of giving what damages they think proper.—*Bac. Abr. Damages, D. 1.*

In computing damages, in some cases, interest will be added to the principal.—1 *Saund Plead. and Evi.* 149.

Interest may be given by the jury by way of damages for wrongfully withholding a debt.—3 *Bing.* 353.

Interest is recoverable in cases where the party has used the money; as where an agent pays the money of his principal into his banker's hands, and uses it as his own.—2 *Esp. Rep.* 702; 9 *Mass. R.* 28; 2 *Bing.* 4.

In some cases, damages, in the nature of interest, are recoverable.—9 *Price*, 134.

Interest is allowed in trover for a note or bill of exchange.—2 *Car. and Payne* 358.

It is apparent, therefore, that at common law, the verdict rendered in this case would be unobjectionable. But the 28th section of the judiciary act of 1799 is relied on, which declares, "that no verdict shall be received on any *unliquidated* demand where the jury have increased their verdict on account of interest, nor shall any interest be given on any *open account* in the nature of damages."—*Prin. Dig.* 212.

And this brings up necessarily the long and much-mooted point: Are all demands "*open accounts*" and "*unliquidated*," unless evidenced in writing? We hold not; and may, at a future time, assign at large our reasons for this conclusion. We understand, by *liquidation*, an amount *certain* and *fixed*, either by the act and agreement of the parties or by operation of law; a sum which cannot be changed by the proof; it is so much, or nothing; and that the term does not necessarily refer to a *writing*. An *open account* is the reverse of this. And this definition is warranted not only by the most approved lexicons, and by *common* as well as *legal* parlance, but imperiously demanded by the principles of justice.

In *Blaney vs. Hendrick*, (2 *Wils.* 205,) it is said, "if on a judgment by default and writ of inquiry, the plaintiff proves an account stated and a balance then due to the plaintiff, the jury should give interest for the *sum so settled*, from the time of its being so liquidated." And *per cur.*, in the same case, "where a note is due, it bears interest from the time; where money is lent, it bears interest from the time it became payable; but for money due for goods sold, (that is upon '*open accounts*,') no interest is allowed."

Numerous other references might be made, to show that in legal, as well as ordinary language, *settled* or *ascertained*, and such like words, are use

Nisbet vs. Lawson.

as synonymous with *liquidated*; and that by the term "*open accounts*," are meant, those debts which are subject to future adjustment, and which may be reduced or modified by proof. And in expounding these prohibitory clauses in the statute, in which the terms "*unliquidated*" and "*open accounts*" occur, we must unquestionably suppose, that our Legislature had regard to these phrases *as then in use*, and employed them accordingly; and hence the manifest propriety of searching for their true meaning, in the sense in which they were used and understood in the books at the time of their adoption.

To adopt the contrary construction, would be to decide that even securities could not recover interest on the money advanced for their principal; and every man's moral sense of right and wrong would oppugn such a doctrine. We should be slow to impute such injustice to our law-makers.

In Pennsylvania, it is now settled that interest is recoverable for money lent.—1 *Binney*, 494. It seems to have been formerly held, says C. J. Tilghman, that interest was not allowable for money lent and advanced. That opinion gradually declined, upon more mature reflection; and, without citing particular cases, it may now be safely affirmed that, for a considerable time, the settled law has been, that interest is recoverable for money *lent and advanced*; also, for a balance ascertained, (4 *Dall.* 287) and *against a man who receives the property of another, and holds it against his consent*.—3 *Bing.* 121.

Interest is allowed in New York where money is paid upon a contract which has been rescinded by the other party.—5 *John. Rep.* 88. And it may or may not be recovered there, according to the circumstances.—3 *Caines' Rep.* 266. And *it is to be recovered where one converts the money of another to his own use, from the time when it ought to have been paid over*.—9 *John. Rep.* 71.

The same doctrine obtains in South Carolina, and in every part of the Union. In *Black vs. Goodman and Miller*, (1 *Bailey's Rep.* 201,) the defendants refused to pay over to the plaintiff a sum of money had and received to his use, unless he would release a suit then pending against them, for a distinct matter. The court refused to set aside the verdict, which (as in the case under discussion) was increased by the interest, upon the ground that the plaintiff was entitled to recover interest from the time of the demand.

And upon these broad grounds of reason, justice and equity, it has been generally held throughout this State, that interest should be allowed on all *liquidated* sums, *from the instant the principal became payable*. Nor do we believe that this interpretation conflicts with either the letter or spirit of our own legislation. And were it my privilege to make the law, instead of to declare it, I would most indubitably settle it the same way.

We are of the opinion, then, that there is nothing in this assignment, and that the judgment be reversed, and the cause remanded, upon the sole ground of the reception of Grimes' testimony, without which there could have been no recovery.

No. 45.—The JUSTICES OF THE INFERIOR COURT of Muscogee county, as a Court of Ordinary, plaintiffs in error, vs. PETER McLAREN, defendant in error.

An executor is bound to return to the Court of Ordinary an inventory of the partnership effects in which his testator had an interest as a co-partner. If not in his power to procure a complete and perfect inventory, then he should return his testator's interest in the co-partnership property, to the best of his ability: the amount of stock on hand at the time of his death—the amount of debts due from and to the co-partnership. The Court of Ordinary, in such case, will exercise a sound discretion as to the kind of inventory they will accept.

On the 3d day of November, 1845, the justices of the Inferior Court of the county of Muscogee, sitting as a Court of Ordinary, in regular term, passed an order, requiring the defendant in error to show cause, on or before the then next regular term of said Court of Ordinary, why his letters testamentary, as executor of James McLaren, deceased, should not be revoked, and he be discharged from said trust, on the ground that he had failed to make any return, within the time prescribed by law, of assets in his hands, in terms of the statute in such cases. With which rule the defendant in error was duly served; and at January Term, 1846, of said Court of Ordinary, the defendant in error appeared, and showed for cause why the letters testamentary granted to him should not be revoked, because he had made no returns, and had shown no assets in his hands; that soon after his qualification as executor he left the State, and that, prior to his leaving, no assets or effects of said testator had come to his hands; that, since his return, he had examined a pocket-book, containing the individual papers of said testator, and submitted a schedule thereof. He further showed that said testator, at the time of his death, was the partner of the defendant in error, in mercantile business, under the firm of J. & P. McLaren; and that he had not returned or inventoried his testator's interest in said concern:

1st. Because his rights in the same, as surviving co-partner, were paramount to his rights as executor; and *that* interest did not constitute assets in his hands, as executor, until the full and final settlement of said partnership concern; and

2d. Because it had been impracticable so to wind up and settle said partnership concern, as to determine the interest of said testator in the same.

The defendant in error further stated, that there were many outstanding debts due said firm of J. & P. McLaren, the right to collect which was in him, as surviving co-partner, and not as executor; and there were debts unpaid due from said partnership, the duty of paying which devolved upon him, as surviving partner, and not as executor. He further stated, that since the decease of his testator, without any individual assets in his hands out of which to pay the same, he had paid various individual debts of said testator, amounting to the sum of six hundred and ninety-five dollars and forty-three cents, and submitted a schedule thereof. This return, or answer, of the defendant in error was sworn to. Upon the hearing before the Court of Ordinary, it was determined that the showing of the de-

ant in error was insufficient ; and thereupon his letters testamentary were, by that court, annulled and revoked ; from which the defendant in error appealed to the Superior Court.

At May Term, 1846, of the Superior Court of the said county of Muscogee, the said appeal was tried before Judge Hill, presiding in said term ; and, after argument heard, the court reversed the decision aforesaid of the Court of Ordinary, and discharged the rule *nisi* granted by that court against the defendant in error ; to which the counsel for the plaintiffs in error excepted, and assigns, that the court committed error in reversing the judgment of the said Inferior Court, sitting for Ordinary purposes.

JAMES JOHNSON, for the plaintiffs in error.

It is the duty of an executor to make an inventory of all the *rights and credits* of the testator.—*Hotchkiss*, 475.

Rights and duties are correlative terms, and when the law imposes a duty, it also declares a corresponding right.—1 *Blackstone*, 88.

The deceased has an estate in partnership property, which the executor must reduce to possession, upon the payment of the partnership debts.—*Story*, 491 to 499.

An inventory is required for the benefit of creditors and legatees, and must contain a description of property in possession and in action.—9 *Petersdorf*, 197 ; *Williams*, 706 ; *Toller Ex.* 251 ; 1 *Ecclesiastical Reports*, 78–81, 185 ; 2 *ib.* 283 ; 3 *ib.* 105 ; 3 *Bacon's Abr.*

HINES HOLT, for the defendant in error.

This case was, by agreement of counsel, submitted to the court, upon the single question, whether the defendant, as executor, was bound to return, as part of the estate of his testator, his (the testator's) interest in a mercantile firm, of which the defendant was the surviving co-partner.

The court having, on the submission of this question, decided that he was not so bound, but that his control over said interest, as surviving co-partner, was paramount to his control as executor, the plaintiffs in error excepted.

The defendant in error will maintain the correctness of said decision, and upon the following authorities—*Gov. on Partnership*, 356 to 360 ; 1 *Paige's Ch. Rep.* 393 ; 3 *ib.* 525 ; 1 *Dallas' Rep.* 248–249 ; 2 *ib.* 65 ; 7 *Mass. Rep.* 257 ; 2 *Hill's Rep.* 595, and cases there cited.

By the Court—WARNER, Judge.

The single question involved in this case is, whether the defendant in error, from the facts stated in the record, ought to have exhibited an inventory to the Court of Ordinary, as the executor of James McLaren, deceased. It appears the defendant and the deceased were partners in trade, and the only question made at the bar was, whether the defendant, as executor, ought to make an inventory of his testator's interest in the co-partnership property. The defendant in error insists, he was entitled to control the partnership property, as survivor, for the settlement of the co-partnership debts, and that the same cannot be considered as assets in his hands, as executor. Although it is true the surviving partner has the right to control the joint partnership property, for the purpose of winding up the co-partnership business, yet, when that is done, the legal representatives of the deceased partner would be entitled to his share of the surplus, if any. By the 1st section of the act of 1764, every executor or administrator is required to cause to be made, on oath, a true and

just appraisement of all and singular the goods and chattels of his testator or intestate, together with a *full and perfect inventory of all and singular the rights and credits of the said testator or intestate*, whether the same be in ready money, judgments, bonds, or other specialties, or notes of hand; together with a list or schedule of the books of account of such testator; to which books, all parties concerned shall, upon request, and at convenient times, have free access: and every such executor and administrator shall be, and they are hereby, made chargeable with the real value of the goods and chattels in said inventory contained, and with so much of the credits only as he, she, or they, after due care and diligence, shall recover and receive, in like manner as executors are made chargeable, by the common and statute law of England.—*Prin. Dig.* 222. By this act, the executor is required to make a full and perfect inventory, of *all and singular the rights and credits of his testator*; but is only made chargeable with so much thereof, as he may recover and receive, after due care and diligence.

The testator, clearly, had a *right*, and an *interest* in the co-partnership effects, of which, in our judgment, the defendant ought to have exhibited an inventory. At any rate, he ought to have stated his interest in the co-partnership property, to the best of his ability; the amount of stock on hand at the time of his death; the amount of debts due from, and to, the co-partnership, for the information of persons interested in the testator's estate. This would be important where the persons interested in the testator's estate were infants, or resided out of the State. In the case of *Phillips vs. Bignell et al.*, Sir John Nicholl held, the executor was bound to exhibit an inventory of a *probable or contingent* interest.—*1st English Ecclesiastical Rep.* 79—See *Middleton vs. Rushout*, *ib.* 81. In *Reeves vs. Freeling*, (*ib.* 185,) an inventory was called for, which was resisted, on the ground it would be attended with great difficulty, as the deceased was engaged in a banking-house, and his profits would not be concluded till May, 1813. The inventory was called for in 1812. Sir John Nicholl, in giving judgment, says: "I have known the court to exercise a judgment on these questions, particularly in complicated cases. It cannot be necessary for the party to enter into all the accounts of the banking-house. The court will in this case exercise a discretion as to the sort of inventory it will accept. It cannot be difficult to make one out. There must be an account for the rest of the family; and though the person calling for the inventory has but a *contingent* interest, he has a right to a constat of the effects." As before remarked, infants and absent persons may be deeply interested in the estate of the deceased partner, and if there was no inventory thereof on the records of the proper court, it might be extremely difficult, especially after a lapse of years, to trace the effects into the hands of the executor. Reason and sound policy seem to require an inventory at the hands of the executor, and the statute requires it. The Court of Ordinary will not require an impossible; but will exercise a sound discretion as to the kind of inventory they will accept. The statute contemplates, he shall make as *full and perfect inventory* as shall be in his power.

Let the judgment of the court below be reversed.

No. 46—ALFRED P. REED, plaintiff in error, vs. JAMES SULLIVAN, executor, &c., defendant in error.

In *scire facias* against bail, where no plea has been filed, judgment may be rendered *upon motion*, without the intervention of a jury; *aliter*, where a plea has been filed.

This was a motion to quash *ca. sa.*, issued from a judgment rendered upon *scire facias* against the plaintiff in error, as bail of another, which judgment was rendered *upon motion*, and without the intervention of a jury trial. This motion was tried before Judge Alexander, in Muscogee Superior Court, May Term, 1846, and, after argument, the motion was overruled; to which the plaintiff in error excepted. For further particulars, see the opinion of the court.

HINES HOLT, for the plaintiff in error.

A *sci. fa.* against bail in civil suits, is an action.—*Tidd's Practice*, 982; 1 and 2 *Term Reps.* 267 and 46; 2 *Saunders' Rep.* 207.

A judgment by default can be rendered on motion in such action.—*Tidd's Practice*, 508; *Hotchkiss*, 788, 635, 637.

A. IVERSON and A. H. COOPER, for defendant in error,

Cited *Petersdorf on Bail*, 379; *Philipson vs. Mangles*, 11 *East R.* 516; *Comyn's Dig. Pleader*, 3, L. 8, 9; *Hotchkiss' Dig. Laws of Geo.* 565.

By the Court—NISBET, Judge.

Scire facias issued in this case to charge bail, and being served, and the defendant filing no plea, judgment was rendered against him *upon motion*. A *ca. sa.* having issued upon this judgment, it was moved to quash it, upon the ground that the judgment on the *scire facias* was rendered against the bail without the intervention of a jury. This motion was overruled by the court below, and thereupon error is assigned. The plaintiff in error contends that the *scire facias* is an action; that the defendant is entitled to plead thereto; and being entitled, by the Constitution of the United States, and of the State of Georgia, to the trial by jury, no judgment can be rightfully entered against him, until a verdict is rendered by a jury. Some of these propositions the court is prepared to admit. It does not, however, admit that where no defence is filed, judgment may not be awarded upon *scire facias*, against bail upon motion, without the intervention of a jury; on the contrary, it holds, that in all such cases judgment is rightfully awarded upon motion, and without the intervention of a jury; and that a judgment so awarded, is not in conflict with the Constitution of the United States, or of the State of Georgia. This court further holds, that in all cases where the defendant appears, and files an issuable plea, which, according to law, he is entitled to rely upon defence, he is entitled to a jury, and that a judgment rendered against

him, in such cases, without a previous finding by a jury, would be in conflict with the Constitution, and therefore void.

The condition of the bail bond is, that the principal pay the condemnation of the court, or render his body to prison, in execution of the same, and upon failure to do either, the surety stipulates to do it for him.—3 *Black. Com.* 416; *Tidd's Prac.* 280. The condemnation of the court is the judgment rendered against the defendant and costs. The obligation assumed by the bail is, that, if his principal shall fail to pay the condemnation of the court, and shall also fail to render his body in execution of the same, then he, the bail, will pay the condemnation for him. Before the surety can be proceeded against for payment, the plaintiff must cause a *ca. sa.* to be issued against the principal, and return to be made of *non est inventus*.—*Prince*, 423; *Tidd's Prac.* 1099. When this is done, the plaintiff may proceed by *scire facias* to collect the judgment and his costs, out of the surety, on the bail bond. This is in general a judicial writ; and issues out of the court where the record is. Yet, because the defendant may plead thereto, it is considered in law as an action. Lord Coke says: "Albeit a *scire facias* be a judicial writ, yet, because the defendant may thereupon plead, this *scire facias* is accounted in law to be in nature of an action, and, therefore, a release of all actions is a good bar of the same."—*Tidd's Prac.* 1090; *Co. Lit.* 290, *b.*; 2 *Wils.* 251; 2 *Black. Rep.* 1227; 2 *Durn. and East*, 46. It is directed to the sheriff; and, reciting the proceedings previously had, and particularly the judgment against the principal, requires him to make known to the principal and his surety, that they appear at the next term of the court, and then and there show cause, if any they have, why judgment should not be rendered against them, on their bond, for the amount of principal, interest, and costs due on the judgment previously rendered against the principal.

In England, if the sheriff warn the defendant, he returns *scire feci*. If he do not warn him, he returns *nihil*, in which latter case, a second *scire facias* issues. On the return of *scire feci*, or of two *nihils*, a four days' rule is given for the defendant to appear and plead thereto. If the defendant appear, then another four days' rule is given for him to plead, or an extent to issue; and after the expiration of four days, the defendant may obtain six weeks further time to plead, on a motion of course; and, after the expiration of six weeks, he may obtain still further time to plead, by motion in court, on an affidavit of special circumstances. If the defendant do not appear on the first rule, or, appearing, do not plead on the second, judgment may be entered up for the king, or process of extent may issue, without any judgment upon the *scire facias*.—*Tidd's Prac.* 1092. The defendant, having appeared to the *scire facias*, may move to set aside the proceedings, if irregular; or plead in abatement, or in bar—or demur, as in other actions.—*Tidd's Prac.* 1092. No plea to a *scire facias* goes behind the judgment. The merits of the contest between the plaintiff and defendant, in the first action, are closed up by the judgment. There are several things, however, which may be plead: such as *nul tiel record* of the recognizance; recovery against the principal; payment by, or release to the principal, or bail; or that the principal rendered himself, or was ordered by his bail, or that there was no *ca. sa.* sued out and returned against the principal; also, the death of the principal, before

of the *ca. sa.*—*Tidd's Practice*, 1128, 1130; 12 *Mod. Prac.* 601; 10 *ib.* 267.

I have been thus minute in detailing the practice, as to the service, return and pleadings upon *scire facias* at common law, because, in many particulars, that practice is the law of our own courts; and, farther, because these rules of practice are not without their bearing upon the question we are now considering. The service here, no doubt, is very much as in England: for example, if the defendant cannot be found, a return of two *nilis* will authorize the farther proceedings against the bail. And farther, if the defendant fails to appear, after service, or after a return of two *nilis*, or, appearing, fails to plead, *judgment may be entered up against him*; he is in default, and judgment goes as a matter of course. Such is the law in England, and such, too, we think, is the law in this State. In the cause now before us, the defendant did appear in obedience to the exigencies of the writ; but, appearing, failed to plead, and therefore, the court did well to award judgment against him, upon motion. Such proceeding was not in violation of the parties' right to a trial by jury; there was nothing to try; no plea filed, no issue made. Failing to plead was an acknowledgment that the bail had nothing to show against judgment being entered against him, for the condemnation of the court. It is to be remembered, too, that the judgment entered against the bail, is not a judgment of *recovery*, but a judgment of execution; that is, the judgment of recovery being previously had, this is the judgment of the court, that execution do issue against the bail for the amount of principal, interest, and costs due thereon.—*Bacon's Abr.* tit. *Execution, G.*; 1 *Tidd*, 339, *S. C.*; *Tidd*, 1099. As we have before stated, however, if the defendant does appear and plead, and any issue of fact is presented by the pleadings legally, he is entitled to a jury to try it; and a judgment rendered against him, upon such an issue, without a previous finding by a jury, would be in violation of the Constitution, and therefore void.

Let the judgment of the court below be affirmed.

No. 47.—SEABORN JONES, plaintiff in error, vs. JAMES H. SHORTER, administrator, and SOPHIA H. SHORTER, administratrix, &c. of ELI S. SHORTER, deceased, defendants in error.

A promise, upon *no new consideration*, to execute a bond to indemnify a co-surety against loss, is void, if made after the liability of *all the parties* to the instrument has been incurred.

A promise by one person to indemnify another for becoming security to a *third*, is not within the statute of frauds, and need not be in writing. And the promisee may recover of the promisor the whole of the moneys which he was compelled to pay by virtue of the bond into which he entered. The assumption of the responsibility is a sufficient consideration for the promise.

was a bill in equity, which, upon motion, was dismissed in the law, Judge Hill presiding, at May Term, 1846, for want of equity.

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The facts, and grounds of error in the case are set forth in the opinion delivered by the Supreme Court, to which the reader is referred.

HENRY L. BENNING, for the plaintiff in error.

HINES HOLT, for the defendant in error.

1st. The contract or agreement set out in the complainant's bill, is within the statute of frauds, and therefore cannot be enforced.

2d. The contract or agreement in said bill charged is too uncertain and indefinite to be enforced, either at law or in equity.

3d. The complainant, by his original bill, does not show himself to have suffered, or sustained any damage, for which he could ask or claim indemnity at the filing thereof; and having no cause of action originally, he could not, by amendment or otherwise, substitute or create such cause of action, and engraft it upon, or make it part of his original bill.

4th. The complainant's own showing, taking together the original bill and amendments, shows that if he had any right or cause of action against the defendants, or their intestate, he had full and ample remedy at law.

5th. Upon the bill and prayer, no decree can be rendered.

These propositions, the defendants in error will maintain upon the following authorities, to wit:

Roberts on Frauds, 207-8-9, &c.; *Chitty on Con.* 204-2-3; 2 *Leigh's Nisi Prius*, 1022-3-4; 1 *Henry Blackstone's Rep.* 120; 2 *D. & East*, 86, 87; 7 *D. & East*, 197-200; 1 *Salkeld's Rep.* 27; 14 *Eng. Com. Law*, 239; 3 *Esp. Rep.* 484; 4 *Johns. Rep.* 422; 3 *ib.* 210; 12 *ib.* 291; 13 *Wend. Rep.* 114-120; 14 *ib.* 246; 1 *McCord's Ch. Rep.* 100; 1 *Stewart's Ala. Rep.* 51; 2 *Story's Eq.* 57-58-59, 67-69-70; 2 *Wheat. Rep.* 336-341; 1 *Johns. Ch. Rep.* 146-7-8-9, 279; 12 *Ves.* 466.

By the Court—LUMPKIN, Judge.

The bill states that George W. Dillingham died intestate, leaving an estate of \$100,000. That shortly after his death, which was in 1834, John Dillingham came to Muscogee county, to administer on said estate; that, being a stranger, he brought letters of introduction from his brother, William Dillingham, of Westchester, Pennsylvania, to Eli S. Shorter, a copy of which is exhibited, making inquiries as to the situation of said estate, and requesting Shorter's aid and assistance to said John, in the settlement of it; that Shorter determined to give such aid; that Alfred Iverson, a creditor of said George, had already applied for the administration of said estate; that Shorter applied to Jones for said John, to obtain his professional services as attorney at law, in procuring the administration for said John, and got Jones's agreement to do so. That Shorter, on the 11th day of October, 1834, addressed a letter to said William Dillingham, in answer to his, which is also exhibited by copy, in which he informed said William that it had been settled, that said John was to take the sole administration; that he, Shorter, had agreed to become one of his securities, and, if required, to furnish balance. That about that time, in pursuance of his intention, expressed in his said letter to William Dillingham, Shorter called upon Jones to join him in the bond, as security for said John; that to this application Jones gave a decided refusal, alleging that he was scarcely acquainted with John Dillingham; that said John was a stranger in the place; that the estate was too large and too much; that Shorter then desisted, but a few days afterwards renewed

cation, and received a similar refusal ; and for the additional reason assigned that he, Jones, could only incur such responsibility for his friends. That Shorter, finding Jones persisted in his refusal, assured him there was no danger, as John Dillingham had brought letters of introduction to him, Shorter, and was highly spoken of ; and that he himself felt solicitous to serve him, and procure the security for him. *That if Jones would join him, Shorter, in the bond, as security, he, Shorter, would indemnify him, Jones, against any loss.* That thus pressed, and having such assurance and promise from Shorter, in which he had full confidence, he, Jones, told Shorter he would consent, if Shorter would add two conditions. The first, to offer himself alone to the court as security for said John, and if not accepted as sufficient, then to offer, in addition, Jones. The second, to take particular supervision over the conduct of John Dillingham, and to see that, as administrator, he conducted himself according to law. That to these conditions Shorter assented ; and that in consideration of his said promise to indemnify Jones, he, Jones, consented to become a security. That, at the Court of Ordinary, in Muscogee, in Nov. 1834, a decision was made against Iverson's said application, and in favor of said Dillingham, upon his giving bond and security ; that then Shorter tendered himself as such security, and Iverson objected to his sufficiency, and the court required additional security ; and that then Shorter offered the name of Jones, with his own, and that this was accepted by the court ; and thereupon the bond was executed by John Dillingham as principal, and Shorter and Jones as securities. *Shorter again repeated the assurance and promise aforesaid, and promised that he would draw up and execute a bond in favor of Jones for his indemnity as aforesaid.* That Jones, confidently relying on said promise, and believing that said Shorter would, at a leisure moment, draw up and execute such bond, omitted to call upon him for it immediately, and not long afterwards left for Washington. That after his return from Washington, he requested Shorter to execute it, and he again promised to do it : that, relying with confidence on Shorter, he then believed, as he still does, that Shorter did not neglect to execute said bond from any intention not to perform his promise, but only from inattention and negligence, in the midst of his great quantity of other business, and the fact that it could be done at any time. That although Shorter never refused to execute said bond, yet he neglected it from time to time—although, when spoken to upon the subject, he always promised to do it—till at last he died without having done it.* That after his death intestate, the administration of his estate was committed to defendants ; that since his death suit has been commenced against Jones, and against him and the defendants on said bond ; that if judgment be obtained against them, Jones will have to pay this same, or a part thereof. The bill prays that the defendants, as administrators of Shorter, execute a bond to Jones to indemnify him against loss for signing Dillingham's bond as security ; and that they may pay the amounts which may be secured against Jones and said administrators as securities on said bond ; that subpoenas issue to said administrators, and that Jones may have such other and further relief as to the court shall seem meet. Afterwards the bill was amended, and thereby was further stated, that a judgment had been obtained against him as security on said bond in favor of the justices of the Inferior Court for the

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use of the Farmer's Bank of Chattahoochy, for \$2,595 principal, \$725 78 cents interest, besides costs and interest from the first of May, 1838; on which he, Jones, had paid \$2,230 on 27th Oct., 1841, leaving a large balance unpaid. That Wm. D. Carnes and wife, as guardians for George W. Dillingham, a minor, had obtained judgment against John Dillingham, as administrator aforesaid, at November Term, 1841, of the Inferior Court of Muscogee county, for \$7,425 83 cents, besides interest from 11th November, 1841; and that, as security on said bond, he had paid and settled one half of said judgment, and that divers other suits in favor of specified parties were proceeding against said John as administrator on said estate, or had been reduced to judgments. The defendants, answering separately, denied having any information of the promises alleged in said bill to have been made by said Shorter to said Jones; and one of the defendants, James H. Shorter, pleads that the promise, if made, was barred by the statute of frauds; and in his answer insists also on the statute of limitations. He admits the payment to have been made by Jones on the judgment in favor of justices of Inferior Court, or of Farmer's Bank of Chattahoochy, and in favor of Carnes and wife as guardians, &c., as alleged in the said amended bill, and the allegations in relation to the other debts and judgments therein mentioned, to be true.

Upon motion, the court below dismissed the bill for want of equity, adjudging that the undertaking of Shorter was within the statute of frauds.

Counsel for complainant excepted, and the case is now submitted for our determination, upon writ of error from Muscogee Superior Court.

Having made the foregoing statement, the Judge proceeded as follows:

This bill sets forth two *distinct* promises or undertakings on the part of Eli S. Shorter, deceased, to Seaborn Jones, the complainant. The *first*, that he (Shorter) would indemnify Jones against any loss, if Jones would join him in going security for John Dillingham, on his administration bond; and this was made before the bond was executed. After the bond was executed, by all three of the parties, Shorter again repeated the assurance he had previously given, "and promised that he would draw up and execute a bond in favor of the plaintiff in error, for his indemnity."

Are these *original* or *collateral* promises? It is worthy to be remarked, that on the trial below, no notice seems to have been taken of the fact that there were two promises, distinct entirely in time, place and substance, the latter only of which is sought to be set up in the bill. As to the *second* promise by Shorter, that he would draw up and execute a bond in favor of Jones for his indemnity, it is clearly void for want of consideration. It was made after administration was granted to Dillingham on the estate of his deceased brother, and when the liability of Jones on the bond had already been incurred by his signature thereto. It was, therefore, a mere gratuitous undertaking—creating, it may be, a moral obligation—binding in honor, but involving no legal responsibility. If benefit were to result to Shorter or his friend Dillingham, (at his request the act was done,) administration was obtained. If loss or inconvenience to Jones, or subjecting him to any charge or obligation at the instance of Shorter, it was irretrievably fixed. He had already signed the a

tion bond as security ; any promise, then, founded upon this transaction which was consummated, was *nudum pactum*.

Respecting the *first* promise, we are of the opinion, that it is not within the statute of frauds. Mr. Roberts, in his treatise on this statute, says : " that the principal point to be ascertained is, whether or not the party who is to be benefited by the promise, is liable at all for this, is implied in the very notion of a collateral promise. If there is no such liability, there is nothing to which the new promise can be collateral, or in relation to which it can be regarded as an undertaking to answer for the debt, default or miscarriage of another. It must, therefore, without such liability in a third person, be an original undertaking in the party promising."

Tested by this rule, the promise of Shorter is clearly an original undertaking, and so not within the statute of frauds. And this conclusion is equally well warranted upon the authority of the cases in the books. It would be misspending time, to go through the whole of them.

In *W. Thomas vs. William Cook*, (8 *Barn. & Cress.* 728,) Bayley, J., says : " Here the bond was given to Morris, as the creditor ; but the promise in question was not made to him. A promise to him would have been, to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. *A promise to indemnify does not, as it appears to me, fall either within the words or the policy of the statute of frauds.*" Parke, J. : " This was not a promise to answer for the debt, default or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing ; and this case is in substance the same."

In *Chapin vs. Merrill*, (4 *Wendell's Rep.* 657,) the court says :— " This action is brought on the parol undertaking of the defendant to save the plaintiff harmless. This is clearly an original undertaking, and is not within the statute of frauds. It was held by Lord Hardwicke, in the case of *Tomkinson vs. Gill*, (*Ambler*, 330,) that if the consideration of the promise take its root in a transaction distinct from the original liability, the case is out of the statute. This proposition is illustrated by the case in which it is laid down, and by the case of *Read vs. Nash*.—1 *Wilson* 305. In the first case, Gill promised the widow and administratrix of an estate, that, if she would permit him to join with her in letters of administration, he would make good any deficiency of assets to discharge the intestates ; in the second, a third person and stranger to a suit for a battery, promised the plaintiff that if he would withdraw his record, and proceed no farther, he would pay him fifty pounds. The person making this promise, which was not in writing, was held liable." It would be unprofitable to multiply decisions upon this point.

The question then recurs, did the court below err in dismissing complainant's bill ? We think not, upon the ground, however, that *he had ample and adequate remedy at common law, on the first promise*. He might either have brought an action of assumpsit to recover damages for a breach of the parol contract, or else Jones might have sued to reimburse himself time to time, as he was compelled to pay out money, by reason of

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this securityship, as did the plaintiffs in the cases in 4 *Wendell* and 8 *Barn. and Cres.*, under precisely similar circumstances.

In the case of *Turner vs. Davies*, (2 *Espinasse*, 479,) Lord Kenyon says: "I have no doubt that where two parties become joint sureties for a third person, if one is called upon, and forced to pay the whole of the money, he has a right to call on his co-security for contribution. *But where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security.*" And so, *e converso*, should he have the whole or any part of the debt to pay, it follows that he would be entitled to recover it back, as paid to the other security's use.

Justice Story, in treating of contribution among sureties, (1 *Com. on Eq.* sec. 498,) remarks: "There may arise by implication, from the nature of the transaction, an exemption of one surety from becoming liable to contribution in favor of another. Thus, if one surety should, not upon his own mere motion, but at the express solicitation of his co-surety, become a party to the instrument, and such co-surety should afterwards be compelled to pay the whole debt, in such a case he would not be entitled to contribution, unless it clearly appeared that there was no intention to vary the general right of contribution, in the understanding of the parties.—*Mayhew vs. Crickett, Swanst. R.* 193; *Taylor vs. Savage*, 12 *Mass. Rep.* 98–102. So, if there should be separate bonds given, with different sureties, and one bond is intended to be subsidiary to and a security for the other—the other in case of a default in payment of the latter—and not a concurrent primary security; in such a case, the securities in the second bond would not be compellable to aid those in the first bond by any contribution."—*Craythorne vs. Swinburne*, 14 *Ves.* 159; *Cook vs. —*, *Freem. Rep.* 97.

For the reason, then, that Jones had full redress at law on the first, which is the only legal promise, and alleges no reason in his bill, either for want of proof or otherwise, why equity should entertain jurisdiction of the matter, we cannot sustain the objection to the judgment below. It must be affirmed with costs.



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No. 48—JOHN H. WATSON, executor of JAMES C. WATSON, deceased, plaintiff in error, vs. WILEY E. JONES, defendant in error.

A court cannot originate a case, or a motion, in vacation, and give judgment thereon, unless the authority is expressly conferred by law. But when a motion originates, during a regular term, and contains a provision for the further action of the court upon it, and for the rendering of its judgment in vacation, to be entered upon the minutes of the court, as of such term, such judgment so rendered in vacation is legal, and should be entered by the clerk accordingly.

This was an action originally brought in the Inferior Court of the county of Muscogee, at the instance of the defendant in error, against the plaintiff in error, who was then in life, as a joint and several maker of the note sued on, with one A. J. McAllister, payable to one James R. Jones, or bearer, for \$1,732 86, dated Columbus, Ga. 25th December, 1841, and due one day after date, signed by McAllister on the face, and by the testator on the back—testator's signature being in the form of a blank endorsement. At the trial term, judgment was confessed, and an appeal taken by the testator, then in life, to the Superior Court. While the cause was pending on the appeal, the testator died; and afterwards the plaintiff in error, one of his executors, was made a party defendant in said cause, and filed his plea of *non-joinder* of the other executors named in the will against whom no *scire facias* had issued. The record does not disclose what action of the court was had on the plea of *non-joinder*. Afterwards, it appears that the plaintiff in error plead specially, that the said testator put his name upon said note, as a guarantor of the same, to answer for the default of the said McAllister, without any consideration for the same, and that said James R. Jones, the payee, after the said testator had put his name on said note, transferred and delivered the same to the defendant in error. Afterwards, at May Term, 1845, of the court below, an order was passed in said case, setting forth that the plaintiff below had failed to prosecute his suit, and ordering that he be *nonsuit*. Afterwards, in the same term, it was ordered that the judgment of *nonsuit*, aforesaid, should be suspended for further consideration by the court, and for its further order, to be entered in vacation as of the then term. Afterwards, at the November adjourned term, 1845, the members of the bar consenting to pass over, without trial, all the litigated business of the then term of the court, until the next regular term, it was ordered that all cases upon the several dockets, involving questions of litigation, or having defence thereto, stand continued generally; and that all motions, exceptions, orders, pleas, and demurrers, which would be in order, or might be filed at the then term of the court, should be in order, and might be filed and taken at the next term. Afterwards, on the 13th day of December, 1845, the counsel for the plaintiff in error filed in the clerk's office of said court, the judgment made at chambers, November 18th, 1845, by the presiding judge, upon the rule *nisi*, which had been taken to set aside said judgment of *nonsuit*, by which judgment it was ordered that the rule be discharged, and the *nonsuit* stand as the judgment of the court,

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and to which was affixed the official signature of the presiding judge. The clerk of the court had omitted to enter the same upon the minutes of the court.

At May Term, 1846, of the court below, Judge Dougherty presiding in said term, the counsel for the defendant in error, moved the court to hear and determine the rule which had been taken as aforesaid, to set aside said judgment of nonsuit, notwithstanding the same had been adjudicated, and the rule discharged by the former presiding judge, in vacation, as aforesaid; to which the counsel for the plaintiff in error objected.

Whereupon the court below decided that the said motion of counsel for defendant in error should be granted, and the court below proceeded to hear said motion. To which decision of the court below, the counsel for the plaintiff in error excepted, and assigned for error, that the court below gave judgment that it would hear and consider of the said rule, notwithstanding the same had been adjudicated and discharged by the former presiding judge of said court.

HENRY L. BENNING, for the plaintiff in error.

HINES HOLT, for the defendant in error, maintained,

1st. That the judge of the Superior Court has no power over the minutes of the court in vacation, conferred upon him by law, and cannot, in any manner, reserve or assume to himself such power.

2d. That the judge of the Superior Court, especially in cases at law, can make no final decision or adjudication of any cause in vacation.

3d. That the power assumed, to make such decision, and enter the same on the minutes of the court in vacation, as of May Term, 1845, even if such power existed, was not exercised, and was therefore nugatory and void, after the occurrence of the next succeeding term.

4th. That the minutes of the court showed the application for said rule nisi to have been so far heard and considered by the court at May Term, 1845, as to suspend the judgment of nonsuit, and was therefore undisposed of and unfinished business of May Term, 1845, upon which the court at May Term, 1846, was bound to act.

5th. That the paper writing purporting to be the decision of Judge Sturgis, was not a decision upon, or applicable to, said case. And that it was not a decision, in any manner published, entered, declared, or notified, of which the court, at May Term, 1846, could take judicial notice.

And in support of these positions, the counsel for the defendant in error submitted the following authorities:

Prin. Dig. 909-10-11, 419-20, 428, 439-40-41, 432, 541; 1 *Tidd's Prac.* 510, 511, 681, 1225; 2 *Tom. Law Dic.* 297; 1 *Tom. Law Dic.* title *Executions*.

By the Court—WARNER, Judge.

The facts in this case, as presented by the record before us, are substantially as follows: At the May Term of the Superior Court of Muscogee county, 1845, the defendant in error was nonsuited by the then presiding judge. During the same term of the court it was ordered, that the judgment of nonsuit aforesaid should be suspended for further consideration by the court; and, for its further order, to be entered in vacation, as of this term. At the next November adjourned term of said court, it appears an order was passed, by the consent of the member

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the bar, that all motions, exceptions, orders, pleas, and demurrers, which would be in order, or might be filed, at the then term of the court, should be in order, and might be filed, and taken at the next term of the court. Afterwards, on the 13th day of December, 1845, the counsel for the plaintiff in error filed, in the clerk's office of said court, the paper mentioned in the record, which purports to be a rule *nisi*, calling on the plaintiff in error to show cause why the non-suit should not be set aside, and the case reinstated, on two grounds.

On the same paper on which the rule *nisi* is found, the following words are endorsed :

WILEY E. JONES
vs.
JOHN H. WATSON, Ex'r, &c. } Assumpsit and nonsuit.

At Chambers, November 18th, 1845.

The defendants having shown cause, in obedience to the rule *nisi*, in the above case, and having duly considered the same, it is ordered, that the rule be discharged, and the nonsuit stand as the *judgment of the court*. Given under my official signature,

JOSEPH STURGIS, Judge.

Received from Mr. Benning, the within document, this 13th day of December, 1845.

B. BEASLY, Clerk.

At a subsequent term of said court, to wit, at May Term, 1846, the counsel for the defendant in error called the attention of the court to said paper, and prayed, that what purported to be a rule *nisi*, in behalf of the defendant in error, might then be heard and considered by the court, notwithstanding what purported to be the decision of Joseph Sturgis, judge of said court. Whereupon, the application, or prayer, of the counsel for defendant in error was granted, and the defendant in the court below ordered to show cause, at the then next succeeding term of the court, why the nonsuit, in said case, should not be set aside, and the same reinstated. To which decision of the court below the defendant below excepted; and now assigns the same for error in this court. The motion made to the court at May Term, 1846, by the counsel for defendant in error, is, for the court to hear, and consider, what *purported* to be a rule *nisi*, in behalf of the defendant in error in said case. The legal character of that paper must be first settled. If it was not a rule *nisi*, granted by the presiding judge of the court, at the term the nonsuit was granted, by what means is the case kept in court? If it was not a rule *nisi*, granted by the presiding judge, at the term of the court the nonsuit was granted, on what principle could the court, at May Term, 1846, make it the basis for its hearing, consideration, and adjudication? We are of the opinion the paper has been recognized by the defendant in error, as a rule *nisi*, granted by the presiding judge, at the term the nonsuit was had: declared to be such under the *official* signature of the then presiding judge; and acted on as such, by the court below, in entertaining the motion to set aside the nonsuit; and we feel bound so to regard it. The main question presented for our consideration is, whether the case was in court at May Term, 1846, or whether it had been legally *adjudicated* before that time.

The record shows, that at May Term, 1845, the plaintiff, by the judgment of the court, was nonsuited. By that judgment, the case was set

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of court. During the same term of the court, it was ordered, that the judgment of nonsuit should be *suspended*, for further consideration by the court, and for its (the court's) further order, in the case, to be entered in vacation, as of this May Term, 1845. It is upon this latter order the defendant in error relies, to keep the case in court. That it was competent for the court to pass the order, suspending the judgment of nonsuit, there can be no doubt. If the court had the legal jurisdiction and authority to pass the order, it had the authority to pass it, with such *limitations* and *restrictions* as, in its judgment, it might think proper to impose. The court could not originate a case, or a motion, in vacation, and give judgment thereon, unless the authority was expressly conferred by law.

But in this case, the motion did not originate in vacation; the motion was made during the session of the court, by offering the rule *nisi*, calling upon the adverse party to show cause why the nonsuit should not be set aside, on the grounds therein stated. The court did not grant the rule, but took further time to consider whether it would grant it or refuse it, and, in the mean time, passed the order suspending the judgment of nonsuit; declaring, at the same time, its further order in the case, when further considered by the court, was to be entered in vacation, as of the same term. Now, we are of the opinion, it was the duty of the clerk to have entered the judgment of the presiding judge, so made in pursuance of the order of the court, on further consideration of the motion, on the minutes of the court, when it was filed in his office, on the 13th Dec. 1845, as a part of the proceedings of May Term, 1845; and that the order passed by the court at that term, would have been his authority for doing so. He must be presumed to have known the order, and he must be presumed to have known the *official* signature of the presiding judge of the court whose officer he was. Indeed, the order expressly contemplates the decision of the presiding judge of the court, on the motion submitted, should be entered in vacation, as of May Term, 1845. But it may be said, the minutes of the court were made up, and signed by the presiding judge, before the decision was handed to the clerk. If the minutes were made up and signed, the presumption is, that the clerk who made them up, and the presiding judge who inspected them, knew of the order, which constituted a part thereof, and left sufficient space for the clerk to enter the decision, in pursuance of the order. The order which suspends the nonsuit, also provides for entering the further order of the court, in *vacation*. The whole order must be taken together. The defendant in error cannot be permitted to divide it, and appropriate that portion which suspends the nonsuit for his benefit, and reject the balance. If the order made by the court in term time, provided for the *suspension* of the judgment of nonsuit, it also provided for its *confirmation*, during the vacation; and, it appears, it was *fully confirmed* by the presiding judge, on the 18th day of November, 1845. In pursuance of the reservation made in the very order, under which the defendant in error claims to keep this case in court, the presiding judge discharges the rule *nisi*, and orders that the nonsuit stand as *the judgment of the court*. It was said at the bar, even admitting the court had the right to reserve, in the order, the entering judgment in vacation, yet it was not exercised, and was void after next succeeding term of the court. The decision of the presiding

of the court bears date 18th November, 1845, ordering the nonsuit to stand as the judgment of the court. At November adjourned term of the court, which was the next in order after the May Term, it was ordered by the court, by consent of the members of the bar, that all cases upon the several dockets, involving questions of litigation, or having defence thereto, stand continued generally; and that all motions, exceptions, orders, pleas and demurrers, which would be in order, or might be filed at the then term of the court, should be in order, and might be filed and taken, at the next term. The decision of the presiding judge of the court was filed with the clerk, on the 13th day of December, 1845; and, as before stated, we think it was his duty to have entered it as of May Term, 1845. Indeed, we are of the opinion, the rights of the plaintiff in error cannot be prejudiced by the *failure of the clerk* to enter the decision, in pursuance of the order of the court. We are also of the opinion, it was the privilege of the plaintiff in error to have moved the court, at the first term, after the decision was filed, to have had it entered on the minutes of the court, as of May Term, 1845, in pursuance of the original order. From the best consideration we have been able to give this case, we are of the opinion, there was a judgment of nonsuit rendered by the court, at May Term, 1845, in favor of the plaintiff in error, and such must be the legal effect of the action of the court thereon, as disclosed by the record; and that the whole case was out of court, when the motion was made at May Term, 1846, to reinstate the same. Let the judgment of the court below be reversed.

No. 49.—FRANCIS DANIELS, plaintiff in error, vs. KYLE and BARNETT, defendants in error.

As between the holder of a banker's check and the endorser, it ought to be presented for acceptance with due diligence. But as between the holder and the drawer, a demand at any time before suit brought will be sufficient, unless it appears that the drawee has failed, or the drawer, in some other manner, has sustained injury by the delay.

This was an action of assumpsit, tried before Judge Alexander in the Superior Court of the county of Muscogee, at May Term, 1846. It was predicated upon a banker's check, drawn by the defendants, Kyle and Barnett, upon the bank of Columbus, for \$524, in favor of L. Gambrill or order, and was endorsed by him to the plaintiff. The check bore date the 15th day of Jan. 1842, and was not presented for payment, or notice given the drawers of the non-payment, until the 15th day of April thereafterwards.

At the trial term, after the case was called for trial, the court below committed the defendants' counsel to file a plea to the merits of the case to which the counsel for plaintiff excepted.

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The counsel for plaintiff then introduced in evidence the certificate of protest of the notary public, showing the demand and notice, three months after the drawing of the check, &c. The defendants' counsel then moved for a nonsuit, which was granted by the court below, upon the ground that the plaintiff could not recover upon the check sued on, because it had not been presented for payment within reasonable time. To which the plaintiff's counsel excepted.

JOHN SCHLEY, for the plaintiff in error, contended :

1st. The court below erred in permitting the defendants' counsel to file a plea to the merits at the trial term, after the case was called for trial, and cited *Hotchkiss*, 570, 572.

2d. The court below erred in deciding that the plaintiff could not recover, and in granting a nonsuit, and cited *Ex parte Brown*, 2 *Story Rep.* 502 ; *Murray vs. Judah*, 6 *Cowen Rep.* 490 ; *Story on Promissory Notes and Checks*, 620 to 632 ; 6 *Boston Law Rep.* 508 ; *Conroy vs. Warren*, 3 *Johns. Cas.* 25 to 265.

HINES HOLT, for the defendants in error, cited the following authorities in support of the decision of the court below, to wit : 3 *Stewart's Ala. Rep.* 172, 185 ; *Chitty on Bills*, 274-5, 323.

By the Court—NISBET, Judge.

This was an action in favor of an endorsee of a check drawn by the defendants upon the bank of Columbus. Demand and notice to the drawers were proven to have been made, three months after date of the check. A motion was made by defendants' counsel for a nonsuit, upon the ground that the plaintiff had not proven presentation for payment, and notice to the drawers, within reasonable time ? Upon this motion, a nonsuit was awarded, and thereupon error is assigned. The only question for us to determine is, whether the drawer of a banker's check is entitled to demand and notice within reasonable time. If he is, it is conceded that the notice in this case, three months after the date of the check, payable presently, was not within reasonable time.

Bankers' checks partake somewhat of the nature of bills of exchange, and they also differ from them in several material particulars. They are negotiable, and as between the holder and the endorser, the same rules apply, which regulate the rights and liabilities of the holder and endorser of notes or bills. A check differs from a bill of exchange in these things, to wit : it has no days of grace, and requires no acceptance, distinct from prompt payment. The drawer of a check is not a surety, but a principal debtor ; he is an original undertaker to pay, and the check is the evidence of his contract ; it is an appropriation of so much money, belonging to the drawer in the hands of the drawee, to the holder, there to remain until called for. The drawer has no right to complain of the holder letting it remain in the hands of the drawee : and he has no right to complain of its not being presented for payment unless, before presentment, the drawee has failed, or in some other way by reason of the holder's failure to present, he has sustained injury. There is some conflict of authority upon this subject, but, after a

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more apparent than real. The rule is distinctly laid down by Chancellor Kent, in these words: "As between the holder of a check and the endorser, it ought to be presented for acceptance with due diligence, (2 *Campb.* 537; *Holt* 313, *note*; 2 *Martin's Louis. Reps.* 327; 10 *Wendell*, 304; 3 *Kent*, 88;) but as between the holder and the drawer, a demand at any time before suit brought will be sufficient, unless it appears that the drawee has failed, or the drawer has in some other manner sustained injury by the delay."—3 *Kent's Com.* 88; 4 *Johns. Cas.* 5; *ib.* 259; 9 *Barnw. and Cress.* 388; 6 *Cowen*, 490; 10 *Wend.* 306; 3 *Kent* 104, *note*, 5th ed. The failure to make demand within reasonable time, is at the risk of the holder, and some of the authorities go the length of saying, that the onus of showing that the drawer has sustained no loss by the delay lies on the holder. The rule, as above stated, is sustained by Justice Story, in his treatise on notes and checks; the whole doctrine is fully and ably reviewed by him.—*Story on Notes and Checks*, 620 to 632. It is also reviewed and settled, according to the rule above, in a late case, reported in 2 *Hill's N. Y. Reps.*—*Little vs. Phenix Bank*, 2 *Hill's Reps.* 425; see also 13 *Wend.* 549; 6 *Wend.* 445; 1 *Hall*, 68; 2 *Hale*, 463. Let the judgment of the court below be therefore reversed on the second ground, the first being abandoned.

No. 50.—GEORGE FIELD, *vs.* DOZIER THORNTON, in error.

Another judge, than the one who presided on the trial of the cause, may preside on the motion for a new trial. It is desirable, however, unless prevented by providential cause, to submit the brief of the testimony to the judge who tried the cause, to be revised and approved of by him.

A case upon a *new trial*, after a verdict by a *petit jury*, or a confession of judgment, upon the *first trial*, is in the nature of an *appeal*, and is to be regulated by the rules of practice which are applicable to appeals; and either of the parties litigant may make *any* amendment of the declaration or answer they may deem necessary.

A notarial certificate, which states that a draft was presented at maturity, and payment demanded and refused for want of funds, and that *due notice* of the *non-payment* was given on the same day to all the parties concerned, is sufficient notice of the *dishonor* thereof.

The owner or holder of negotiable paper may bring an action upon it, in the name of a person having no interest in it.

As a general rule, it is true, that suits should be brought by the persons having the *legal interest* in contracts; but in the case of negotiable notes, suits may be brought in the name of persons having no such interest. They may sue as trustee for the persons having the real interest.

The question of title, in negotiable paper, is one which the defendant will not be permitted to raise; unless it is made to appear that it is necessary for the purposes of his defence.

The facts of this case, and the errors assigned, are set forth in the delivered by the Supreme Court, to which the reader is referred.

JOHN SCHLEY, for the plaintiff in error.

1st. The court erred in deciding to hear and determine the motion for a new trial, in this case, which was tried before his Honor Judge Hill, presiding in said court at the time, and to whom the brief of all the testimony in said case had not been submitted—had not undergone his supervision, and had not been agreed to by the counsel, and cited to this point 61st rule of the Superior Courts.—2 *Tidd's Prac.* 914.

2d. The court erred in deciding, that the defendant's counsel, at the trial term of the case, after the same was called for trial, could file a plea to the merits, containing new and distinct matter of defence, which subject matter of defence existed before the commencement of the action, if it ever existed, and relied upon *Hotchkiss*, 570, 572, as authority to this point.

3d. The court erred in deciding, that a demand and refusal of payment of a bill of exchange, and notice of the non-payment thereof to the defendant, is not equivalent to a dishonor of the bill, and notice thereof to the defendant; and submitted the following authorities to this point:—*Sheal vs. Britt*, 1 *Pick. Rep.* 401; *Mills vs. Bank U. S.* 11 *Wheaton's Rep.* 431; *Smith vs. Whiting*, 12 *Mass. Rep.* 6; *Story on Bills*, 301 and 380; *Conroy vs. Warner*, 3 *Johns. Cas.* 259 to 265; *Reedy vs. Seixas*, 2 *Johns. Cas.* 337.

4th. The court erred in deciding, that under a plea setting forth that the bill sued on was not the property of plaintiff, but was the property of a third person, the defendant would be permitted to prove the sayings of the plaintiff; that the said bill belonged to a third person, then and before the commencement of the action; and cited the following authorities to this point:—*Duncan vs. Spear*, 11 *Wend. R.* 54; 5 *Barn. and Adol.* 909, 1098; 4 *Adol. and Ellis*, 870; *Peacock vs. Rhodes, Douglass*, 636; *Conroy vs. Warner*, 3 *Johns. Cas.* 259 to 265; 1 *Johns. Cas.* 169.

HENRY L. BENNING, for the defendant in error.

By the Court—LUMPKIN, Judge.

This action was brought in the Superior Court of Muscogee county, by George Field against Dozier Thornton, upon a bill of exchange for fifteen hundred dollars, dated at Apalachicola, and drawn by Harper and Holmes upon William H. Harper, of Columbus, Georgia; payable to Dozier Thornton, endorsed by him to Jonathan A. Hudson, and by Hudson to Field, the plaintiff. The bill not being paid at maturity, was protested for non-payment, and due notice thereof given to all the parties concerned. The notarial certificate, filed in the clerk's office, at the appearance term of the cause, as authorized by the statute, proved that payment of the paper was demanded at the Bank of Columbus, and refused for want of funds, and that on the evening of the same day due notice of the non-payment thereof was given to the drawers and endorsers.

The defendant pleaded the general issue; and further, that said bill, at the commencement of the suit, was and still continued to be the property of the Southern Life Insurance and Trust Company, a corporation created by the Governor and Legislative Council of the Territory of Florida; and that said body, being insolvent, had fraudulently used the name of the plaintiff in said suit, instead of their own, to prevent defendant from pleading his just sets-off against the said And further, that said company, at the time they placed the

the hands of the plaintiff to be sued in his name, had suspended cash payments for their debts, and thereby forfeited their franchises, and ceased to exist, and that consequently the transfer to the plaintiff was void.

At the trial term of the action, judgment was confessed to the plaintiff by the counsel of the defendant, for the debt, with interest and costs. And the defendant, being dissatisfied, claimed to appeal; and not being able to give security, made affidavit that he had a good and meritorious ground of defence, and was unable to give security; whereupon the court directed, that the defendant be permitted to appeal without paying costs and giving security, as required by law. At the next succeeding term, the appeal was dismissed, on the ground that the defendant had no right to appeal, under the act of 27th December, 1842; passed to enable parties, plaintiffs or defendants in any court in this State, to appeal, without paying costs and giving security, as now required by law, on certain conditions therein mentioned. This case was instituted before the enactment of the law, and by the terms of it, it was applicable only to those to be commenced thereafter.

The defendant then moved the court for a new trial, upon several grounds therein stated and verified by affidavit, which was granted. At May Term, 1846, the cause was tried by a special jury, who returned a verdict for the whole amount of the bill, with costs, Judge Hill presiding. Some days thereafter, Judge Hill left the bench and went home, promising to return and hold the court another week for Judge Alexander. During the absence of Judge Hill, a motion for a new trial, with a brief of testimony, as far as it went, was submitted to, and signed by, plaintiff's counsel, who, being compelled to leave town, procured the services of another attorney, to attend to and argue the said motion before Judge Hill, when he should return to hold the court. Judge Hill did return, and preside a week or ten days more during the term; but no effort was made to call up said motion, nor was a brief of the testimony submitted to him for his revision and approval. Judge Hill having finally left the court, the motion for a new trial was called up, when counsel for plaintiff objected to Judge Alexander's hearing and determining said application; because a brief of *all* the testimony had not been agreed upon by counsel, or been reviewed and sanctioned by the judge who tried the cause; and that therefore Judge Alexander could not judicially know the facts necessary to a correct determination of the motion, and that the party should have made the application to the judge who tried the issue, unless prevented by providential cause.

Plaintiff's counsel having positively refused to enter into any agreement, as to the evidence in the case, Judge Alexander allowed the defendant's counsel to make oath to the facts, so far as agreed to, and that the brief contained in substance all the testimony adduced on the trial. Plaintiff's counsel declined to take issue upon the truth of this statement. Plaintiff's counsel was asked if he knew of any facts, not included in the brief. He demurred to being thus catechised, as to what he was pleased to denominate an *ex parte* proceeding; adding, he were to consent to answer, his memory was too indistinct.

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enable him to do so. Judge Alexander then determined to entertain the motion; whereupon plaintiff's counsel excepted.

Argument was then heard upon the motion for a new trial, which contained the following grounds, to wit:

1st. Because the court refused to receive at this term the plea of defendant of notice to plaintiff to sue the acceptor of said draft, and his failure to do so for more than three months thereafter.

2d. Because the court permitted the plaintiff to use in evidence a notarial certificate or protest, to prove notice of the dishonor of said draft, and because the court charged the jury that a notice to the defendant of the non-payment of said draft was equivalent to a notice of the dishonor thereof.

3d. Because there was no evidence before the jury of the dishonor of said draft, or of the notice of its dishonor to defendant.

4th. Because the court refused to permit the defendant to prove, or to examine a witness to prove, that he had heard plaintiff say, that said draft was still the property of the Southern Life Insurance and Trust Company, and was so at the time of the commencement of said suit.

The court having heard and considered the foregoing motion, ordered a new trial in said case to be had at the next term, upon the 1st, 2d, and 4th grounds therein set forth; whereupon plaintiff's counsel excepted.

I am of the opinion, that under the circumstances I should have refused the rule. There had been a confession of judgment, and a verdict of a special jury, in favor of the plaintiff; and the defendant assigned no excuse for failing to make the application to Judge Hill. In England, so much respect is paid to the opinion of the judge, who tried the cause, that if he express himself satisfied with the verdict, it is usual not to grant a *new trial*. And, on the other hand, if he be dissatisfied, it is pretty much a matter of course to grant it; especially when it depends in any degree upon the evidence. Still as to the *legal right* of Judge Alexander to entertain the motion for a new trial, there can be no doubt. Nothing is more common than for a different judge from the one presiding at the trial, to preside on the application for a rehearing. Before hearing the rule discussed, it would have been better, at any rate, to have had the brief of the testimony submitted to Judge Hill, who tried the cause, and approved by him; especially as there was no providential cause intervening to prevent. Even where the facts are argued upon, this is the safer course; yet we cannot see sufficient error in the proceeding to authorize the interference of this court.

Let us now examine the three grounds upon which the new trial was granted. The first reason assigned was, on account of the refusal of the court which tried the cause to receive the plea of defendant of notice to plaintiff to sue the acceptor of said draft, and his failure to do so for more than three months thereafter.

By the act of 1831, it is declared, "that in every case which may thereafter arise where the security or endorser of any promissory note, or other instrument, after the same has or shall become due, has required, or shall thereafter require, the holder thereof to proceed to collect the same, and the said holder has not proceeded, or shall "

ceed, to do so within three months after such notice or requisition, the endorser or security shall be no longer liable." And it was under the promise of this statute that the defendant sought to get in his plea.

The error of the court below in rejecting this defence originated, it would seem, in the idea that this was still a trial at *common law*, and not in the nature of an *appeal*. The judiciary of 1799, in requiring pleas to be filed on or before the *last day of the first term*, has reference, evidently, to the *first trial* of the cause; and the refusal to admit the answer was predicated upon that provision of the statute.

How stands the cause, then, when a new trial has been granted after a verdict, by the *petit jury*? Our law, giving concurrent jurisdiction to the common law side of the superior courts, enact^d, that they "shall have power to correct errors and grant *new trials* in any cause depending in any of the said Superior Courts, in such manner and under such rules and regulations as they may establish, and according to law, and the usages and customs of courts." Further: "*All new trials shall be had by a special jury, to be taken from the grand-jury list of the county.*"—*Prin. Dig.* 432.

It is obvious, then, that a case on a *new trial* is in the nature of an *appeal*. One important reason which operated on the Assembly no doubt was, to give a party who was unable to appeal the benefit of a *special jury trial* on the second hearing. This identical case illustrates and enforces the necessity and propriety of this construction. Here the defendant had entered an appeal, under the special order of the judge, which had to be dismissed upon motion, as not coming under the act of 1842; and then the court granted a *new trial*, as it were *in lieu thereof*.

It is material to settle this preliminary point, as it is the pivot upon which the judgment of the court turns in disallowing the defence.

On the *appeal*, either of the parties litigant may make any amendment of the declaration, or *answer*, they may deem necessary. At the first term of the appeal, it is good cause of continuance that the party desires to make a substantial amendment, unless the opposite party shall permit it to be done *instantly*. And, under the direction of the court, a substantial amendment may be made *on the appeal* either of the declaration or *answer*, *even after the case has gone to the jury*.—*Hotchk.* 943, 950. These are admirable provisions in our rules, and the only regret is that they do not go further. *O, si sic omnia!* In allowing amendments, courts have been of late more liberal than formerly. We have many salutary statutes upon the subject. We still lack, however, one great masterpiece of legislation, which will allow any and all amendments to be made, either at common law, or on the appeal, in matters of form or of substance; due regard being always had to the rights and interests of the opposite party.

Upon the *first* ground, therefore, in the *rule*, we have no doubts whatever that the court below was right in granting a new trial.

On the third assignment, that the court erred in deciding that *due notice* of the non-payment of a bill of exchange was not equivalent to notice of the dishonor of the bill, we are with the plaintiff in error.

It seems to be conceded that no particular form of notice is necessary,

¹ that the great object of the notice is to put the party on his guard
² to be affected by it. The notarial certificate states that *due notice*

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of the non-payment was given. It may be fairly insisted that this includes notice of the demand, and refusal on the part of the acceptor. But even if the notice came actually short of this, and only informed Thornton of the fact that the bill had not been paid at maturity, and had been protested on that account, that was enough to put him on the look-out, and he could easily have acquired all the other knowledge necessary for his safety.

As to what notices of the dishonor are, and what are not, sufficient in form, there are a great variety of decisions, not easily reconcilable with each other. The *earliest* cases insist upon a good deal of strictness; the latter are far more liberal, and founded upon more just and equitable considerations.—*Story on Bills*, p. 338, note. In general it may be stated that no particular language or form is indispensable to be used. It is sufficient if it contains a true description of the bill, so as to identify it; that it states that it has been presented for acceptance, and has been dishonored, and protested for non-acceptance; and that the holder, or other party sending the notice, looks to the party to whom the notice is sent for indemnity and satisfaction. *Indeed, these statements need not appear in positive or express words; but it will be sufficient if they arise, by fair and reasonable implication, from the language used.*—*Ib.* sec. 301.

The reporter, in the marginal note to the case of *Hartley vs. Richard Jesson Case, the younger*, (4 Barn. and Cress. 339,) lays it down, that a notice of the dishonor of a bill of exchange must contain an intimation that payment has been refused by the acceptor. Here, then, was a full and positive statement of non-payment.

The same expression is used by Chief Justice Tindal, in *Solarte vs. Palmer*, in the Exchequer chamber, (7 Bingh. 550,) "The notice should convey an intimation to the party to whom it is addressed that the bill is in fact dishonored."

In *Gurgeon vs. John Smith*, (6 Adolphus & Ellis, 501,) in an action by the endorsee of a bill of exchange against the drawer, the following notice of dishonor was held sufficient: "Bill," &c., "drawn by you, is this day returned with charges, to which your immediate attention is requested;" signed by the endorsee. Counsel argued, upon the authority of *Hartley vs. Case*, which was not only unanimously confirmed in the Exchequer chamber, but sustained on appeal to the House of Lords, that the notice ought to contain an express statement, both that the bill had been dishonored, and that the party giving the notice intends to look to the defendant for payment. Lord Denman, C. J. "This is clearly the effect of the notice in this case;" and the other judges, Littledale, Pateson and Coleridge, concurred.

Chancellor Kent, in his *Commentaries*, (vol. 3, sect. 44, p. 108, 4th ed.) lays down the principle, that the notice must specify that the bill is dishonored, for the reason, that the drawer may secure his claim against the acceptor, and the endorser against the maker. He admits, however, that no precise form of notice is necessary, and that it is sufficient to state the fact of non-payment; and that it is not necessary to state expressly, for it is justly implied, that the holder looks to the endorser. And this doctrine is maintained in the broadest terms, in some of the leading adjudications in this country. I need only to refer to against *United States Bank*, (11 Wheaton's Rep. 431,) where

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decided—Mr. Justice Story delivering the opinion—"that it was not necessary that the notice should contain a formal allegation, that it was demanded at the place where it was payable. *It is sufficient if it state the fact of the non-payment of the note, and that the holder looks to the endorser for indemnity.*"

Here the certificate recites that the bill was presented, and payment refused for want of funds, and that, on the evening of the same day, the notary gave *due notice of its non-payment to all the parties concerned*. And, I repeat, the fair implication is, that the notice contained the fact of demand and refusal. But if it did not, and only informed the defendant of the *non-payment* of the bill at maturity, the necessary inference was, that the note had been *presented and dishonored*, otherwise it would not have been protested for non-payment, and he notified thereof. No mercantile or business man could doubt the meaning intended to be conveyed by this paper. It would be attended with the utmost inconvenience and mischief, if technical precision was required in such cases. In the opinion of the court, therefore, this notice was sufficient.

The last ground taken, in the rule for a new trial, and sustained by the court, was, because the judge who tried the cause refused to permit defendant to prove, or to examine a witness to prove, that he heard plaintiff say that said draft was still the property of the Southern Life Insurance and Trust Company, and was so at the time of the commencement of said suit. The necessity of considering this point, will likely be avoided by amending the pleadings on the next trial. And the doctrine which it involves has been already examined, to some extent, and passed upon at this term, in the case of Lawson and Nisbet. We there held, that the title of the plaintiff, as the holder of negotiable paper, could not be questioned, unless justice to the defendant made it necessary. Here the pleadings present no issues, which would justify a departure from the position assumed. The plaintiff, Field, derives his title to the draft, sued on by a regular series of endorsements, from the drawee, Dosier Thornton. It is true, that the defendant pleads, and offers to prove, that the legal title is not in the plaintiff; yet he has filed no set-off against the true owner, or any other defence, in support of which his testimony could, by any possibility, be made available.

This point was presented, in all of its length and breadth, in *Guernsey vs. Burns and Graves*.—25 *Wend. Rep.* 411. There the plaintiff declared, *in assumpsit*, on the common money-counts, and attached to the declaration a copy of a note, made by the defendant, bearing date 5th October, 1839, for the sum of \$400, payable three months after date, to the President, Directors, and Company of the Bank of Western New York, at their banking-house, or to bearer. The defendant pleaded—1st, *non-assumpsit*; and, 2d, that they never undertook or promised to pay the plaintiff any sums of money whatever, directly; and never became, and are not, at the time of pleading, liable to pay him any money, for any cause or consideration whatever, unless he is the owner and lawful bearer of a certain promissory note, made by them, &c., (describing the note sued on,) which note, they say, was, at the time it fell due, and still is, the property of the said president, &c.,

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traversing that the plaintiff was or is the lawful bearer or owner of the note. To this plea the plaintiff replied, and the parties went to trial. After the note was read in evidence, the defendant read a stipulation, signed by the plaintiff's attorney, that, on the trial of the cause, he would admit that the *beneficial interest*, in the promissory note in controversy, was, at the time of the commencement of the suit, and on the 30th April, 1840, (the date of the trial,) continued to be in the Bank of Western New York! The plaintiff then proved, that, prior to the commencement of the suit, he was, and still continued to be, president of the Bank of Western New York, and that the note in question was sued under an arrangement with the bank, that he should, in his own name, sue and collect the negotiable notes in which the bank was *beneficially interested*. The jury, under the direction of the judge, found a verdict for the plaintiff, and the defendant moved a new trial. By the court—*Nelson, C. J.* "The note is *payable to bearer*, and of course transferable by delivery; and a person thus holding it has the *legal interest*, and *may maintain the suit*. It is true that the replication sets out, that the plaintiff is the lawful owner and bearer, *whereas the property of the note is in the bank*; but, as between the plaintiff and the defendants, the plaintiff is, in judgment of law, the owner, and they are precluded from disputing it; unless the possession is *mala fide*, and was working some prejudice to them, *they have no concern with that inquiry*."

I have extracted the foregoing case entire—pleadings, proof and decision. No one can fail to perceive its entire parallelism with the one before the court. The only difference is, that the note in the one is payable to bearer, and the draft in the other is endorsed to the plaintiff.

The previous case, of *Gage vs. Kendall*, (15 *Wend.* 640,) is still more strikingly analogous, if possible. *Kendall* declared, in the court below, on a promissory note made by *Gage*, payable to *William Castle* or bearer. The defendant pleaded the *general issue*, and gave notice, with the plea, that he would prove on the trial that the plaintiff, at the commencement of the suit, had no title to, or interest in, the note declared on, but had transferred the same to one *Shankland*, who was the owner and holder thereof; and that the suit was commenced without the knowledge, consent or authority of the plaintiff. On the trial, the defendant offered to prove the facts set forth in his plea. The evidence was objected to, and rejected by the court. The defendant excepted. The plaintiff obtained a verdict; upon which judgment was entered. The defendant sued out a writ of error:

Per Curiam.—"The question is, whether the fact that the holder and owner of a negotiable note, having prosecuted such note in the name of a stranger, without his knowledge or consent, is a bar to a recovery in the name of such nominal plaintiff?"

"Perhaps this question cannot be better answered than it has been by this court in *Lovell vs. Evertson*.—11 *John. Rep.* 52. The note being endorsed in blank, (in this case payable to bearer,) the owner had a right to fill it up with what name he pleased; and the person whose name was so inserted would be deemed, on record, as the legal owner; and if — so in fact, he could sue as trustee for the person having the real¹. But the defendant could have no concern with that question. He w

ble to the person whose name was so inserted in the blank endorsement. It is true, as contended for by the plaintiff in error, that suit should be brought by the person having the legal interest in the contract; but in the case of negotiable paper, a suit may be brought in the name of a person having no interest in the contract. He may sue as trustee for those who are interested. But why should the defendant give himself the trouble to investigate the plaintiff's title? He owes the money to some one. A recovery in this case, with proper averments, might be pleaded in bar of a new suit, in favor of any other person. The defendant is not deprived, in such suit, of any defence which he may have as against the real owner. There is, in principle, no objection to a suit on a promissory note in the name of a nominal plaintiff."

And, traveling back still further, it was ruled in *Olcott vs. Rathbone*, (5 Wend. 494,) that the owner of a promissory note, endorsed in blank, can make whom he pleases the holder.

This same point came up in *Banks vs. Eastin*.—15 Martin's Rep. La. 291, IV. S. An action was brought by the endorser of a promissory note against the maker. The petition stated that the instrument sued on was endorsed to the plaintiff, and that the defendant was indebted to him the sum therein expressed. The answer denied that the plaintiff had any interest whatever in the note. And, on the trial, the defendant proved that it did not belong to the plaintiff, but had been placed in his hands for collection. On this evidence the judge nonsuited the plaintiff, and he appealed:

Porter, J.—"The evidence given as to want of interest in the plaintiff was excepted to; and the question is, therefore, presented, whether, on a simple allegation in the answer, that the plaintiff is not the owner of the instrument sued on, such inquiry can be gone into? The blank endorsement makes the bill transferable by the endorsee, and every subsequent holder, by mere delivery; and so long as the endorsement continues in blank, it makes the bill, or note, payable to bearer. It appears to us, therefore, that whether the plaintiff was the owner of the note sued on, or not, was a question with which the defendant had nothing to do."

In *Brigham vs. Mareau*, (*Pick. Rep.* 40,) the court held, that it was no objection to the action that it was brought in the name of Brigham, although it was admitted that it belonged to Peck, the payee.

We think it apparent, from the authorities cited, and the list might be almost indefinitely enlarged, that the court erred in granting the rule on the fourth ground.

Nor do we see any reasonable objection to the doctrine, when properly understood and administered. It injures no one. Where the defendant has equitable grounds of defence against the real owner, he cannot be deprived of them by an assignment which is not *bona fide*. But when, by the pleadings, he fails to bring himself within the protection of this exception, the holder of a negotiable note, blank endorsed, or payable to bearer, should be entitled to recover. Nor should the defendant be permitted, in a mere spirit of legal *Quixotism*, to take a tilt against his right. The judgment will form *res adjudicata* against any other person claiming an interest in the instrument.

It is ordered, therefore, that the judgment of the Circuit Court be affirmed upon the question of jurisdiction, in entertaining the motion for a new trial, and also in granting the rule upon the first ground.

No. 51.—JOHN P. GARVIN, plaintiff in error, vs. WILLIAM R. GALLAGHER, defendant in error.

A *scire facias* against only one defendant as bail, issued by the clerk of one county, and directed to the sheriff of another, is bad, and will be quashed upon motion.

A *scire facias* against bail is not such an original suit, within the meaning of the Constitution of Georgia, as to require it to be instituted in the county of the bail's residence.

In the absence of any issuable defence by the bail, the court will render judgment upon the return of the *scire facias*, without the intervention of a jury.

This was a motion to quash a writ of *scire facias*, sued out, at the instance of the defendant in error, against the plaintiff in error, in Muscogee Superior Court, heard before Judge Alexander, at May Term, 1846.

It appeared that the defendant in error had sued out civil process in the Superior Court of said county, against one Robert Walsh, requiring bail, and that upon his being arrested, the plaintiff in error became his bail. The suit against Walsh was prosecuted to final judgment, and execution against his body was thereupon issued, and returned that he was not to be found. Whereupon the said writ of *scire facias* was sued out, (issued by the clerk of the Superior Court of said county,) directed to the sheriff of the county of Bibb, where the plaintiff in error then resided, requiring him, the plaintiff in error, to appear and show cause, (if any he had,) why the defendant in error should not have execution against him for the amount due on the judgment aforesaid. At May Term, 1846, of the said Superior Court, the counsel for the defendant in error was proceeding to trial upon said *scire facias*, when the counsel for the plaintiff in error moved to quash the same, on the following grounds, to wit:

1st. Because the same was issued by the clerk of the said Superior Court of Muscogee county, and directed to the sheriff of said county of Bibb, and by said sheriff served upon the plaintiff in error, he being the sole defendant in said writ of *scire facias*.

2d. Because, as appears upon the face of said *scire facias*, the said plaintiff in error, at the time of suing out and service of the same, resided in the county of Bibb, in which county alone he was liable to be sued, and compellable to answer.

The court below, after argument, decided that said grounds were insufficient, and overruled them, and dismissed the motion to quash. To which the counsel for the plaintiff in error excepted.

The defendant in error, in support of his said *scire facias* and of his motion to enter judgment thereon, then submitted to the court the record of his recovery against Walsh, the principal in the original suit, the bail bond, and *capias ad satisfaciendum*, with the usual legal entries and returns thereon, and moved the court for leave to enter up and sign judgment in terms of the statute, in such cases. And thereupon the counsel for the plaintiff in error objected, and insisted that a judgment at law could only be rendered and allowed upon the verdict of a jury, which objection was overruled by the court, and a judgment was rendered against the plaintiff in error accordingly. To which the counsel for the plaintiff excepted.

HINES HOLT, for the plaintiff in error,

In support of the exceptions taken to the decision of the court below, submitted the following authorities:—*Prin. Dig.* 420, 421, 910, 436, 423, 426, 419; 9 *Cowen's Rep.* 208, 230; 2 *Tom. Law Dic.* 288; 1 *Tom. Law Dic.* title *Execution*; *Bacon's Abr.* title *Sci. fa. A C*; *Tidd's Prac.* 1090, 1128.

G. E. THOMAS, for defendant in error.

By the Court—WARNER, Judge.

There were three objections made by the plaintiff in error in the court below to the proceedings there, which were all overruled by the court. First, Because the *scire facias* was issued by the clerk of the Superior Court of Muscogees county, directed to the sheriff of Bibb county, and served by him on the plaintiff in error, who was the *sole defendant* in said writ of *scire facias*. We are not aware of the provision of any statute, which confers the authority on the clerk of one county to issue process directed to the sheriff of another county in civil cases, where there is but *one defendant sued*. The 11th section of the judiciary act of 1799 (*Prin. Dig.* 421) declares, where a suit shall be instituted in any of the said courts, on any bond, note, or other written obligation, subscribed by several persons, who reside in different counties, the plaintiff shall have his option, to institute his action in either of the counties; and the clerk may issue process for the defendants residing out of the county in which the suit is instituted; and the sheriff of such other county is required to execute and return the same. But here there is only *one defendant*, and the case made by the record does not bring it within the provision of the 11th section of the judiciary act. The clerk is an officer of limited authority; and it does not appear the law has conferred upon him the power to command the sheriff of Bibb to serve process, under the state of facts presented by the record in this case.

The second ground taken was, Because it appears upon the face of the *scire facias*, the plaintiff in error, at the time of suing out and service of the same, resided in the county of Bibb, in which county alone he was liable to be sued. We do not think *scire facias* against bail is such an *original suit* as was contemplated by the constitution. The original suit in our judgment gave the court jurisdiction to proceed against the bail, being part of the proceedings which appertain to the original suit.

The third ground taken was, that a judgment could not be entered on the *scire facias*, without the verdict of a jury. As has been already stated, the *scire facias* is only a *part* of the proceedings appertaining to the original suit. It calls upon the bail to show cause, why the amount of the judgment rendered in the original suit should not be rendered against him; if he has nothing to say against it, there appears to be no good reason why judgment should not be rendered against him on motion; but if he has any answer, or defence to make, by way of plea, why judgment should not go against him, then he is entitled to a jury, to try the issue of facts made by such plea. Such, it is believed, has been the general practice prevailing in our courts on this subject; and we see no reason for disturbing it. The judgment of the court below, however, cannot be reversed on the first ground taken, and a new trial granted.

No. 52.—WILLIAM ROBINSON, plaintiff in error, vs. STEAMER LOTUS and OWNERS, defendants in error.

It is not sufficient, in a proceeding under the act of 1841, giving to all persons employed on steamboats, and other water crafts, on the Chattahoochee, Altamaha, and Ocmulgee rivers, a lien on said steamboats or water craft, for wages, &c., for the plaintiff or affiant to swear to the amount due for services rendered on board such boat, without further showing the case to be within the provisions of said act, either in the pleadings, in the form of a petition, or in the affidavit by way of recital.

The said act is in derogation of the common law, and must be construed strictly.

The defendant is not precluded of his right to a motion to quash, or to arrest the judgment, because the second section of the act points out the mode of contesting the amount due. The motion to quash admits the amount claimed to be due, but insists, that *from the pleadings, it does not appear* that the plaintiff has any cause of action against the defendant.

A petition, setting forth all the necessary facts, and accompanied with the affidavit required by the statute, would be a convenient form of pleading in these cases.

This case was tried by Judge Alexander, in Muscogee Superior Court, May Term, 1846.

The opinion delivered by the Supreme Court contains the facts of the case and the points decided.

HINES HOLT, for the plaintiff in error.

JAMES JOHNSON, for the defendant in error.

By the Court—NISBET, Judge.

This was a proceeding under the act of the Legislature, passed in 1841, giving to captains, pilots, and certain other persons therein named, a lien on steamboats and other water craft, engaged in the navigation of the Chattahoochee, Altamaha, and Ocmulgee rivers, for debts, dues, wages, &c., held against the owners, for personal services rendered on board said boats and water craft. For the act at large, see *Hotchkiss*, 625-6. The affidavit was made before Judge Alexander; upon it, judgment was rendered in favor of the affiant, execution issued, and the steamer Lotus was brought to sale. The money being in the hands of the court for distribution, a motion was made to quash the execution, upon the ground that the plaintiff's affidavit did not bring his case within the requirements of the act. The motion was sustained by the court, and upon it the plaintiff assigns two grounds of error:

1st. Because said affidavit is made in exact accordance with the law, and is therefore sufficient in law.

2d. Because the defendant has not pursued the mode of defence pointed out by the law, to which alone he was entitled.

These questions depend altogether upon the construction of the act of 1841. The affidavit in this case sets forth the amount due to the plaintiff for services rendered by him on board the steamer Lotus. It is contended by counsel for the plaintiff in error, that the statute requires the party to swear to nothing more than was sworn to in this case.

the oath was in exact pursuance of the law, and, therefore, sufficient in law. It is true that the act does require the plaintiff to swear to nothing more than he did swear to; and, so far as the oath is concerned, that is full enough. But we think that the pleadings of the plaintiff, in the form of a petition, or of recital in the oath, should show his case within the provisions of the act. This act is in derogation of the common law, and must be construed strictly. It creates a lien in favor of certain persons, under certain circumstances, which overrides all other liens. Before this lien can be allowed, the party must show compliance with all the conditions, and bring himself within all the requirements and limitations of the statute. He could scarcely be held to show thus much, unless he is held to make averments to the like extent. As before intimated, we are of opinion that a petition, setting forth all the necessary facts, and accompanied with the affidavit required by the statute, would be a convenient form of pleading in these cases. The act creates the lien upon steamboats and other water craft, navigating the Chattahoochee, Altamaha, and Ocmulgee rivers, and no other rivers. The plaintiff should, therefore, show, that the lien which he seeks to enforce is upon a steamboat or other water craft, navigating one of those rivers. The act gives the lien only to a certain description of persons; he should show that he is one of those contemplated in it. It requires that the plaintiff should make demand, and prosecute the collection of his claim, within twelve months after the same shall become due and payable. He should aver, that demand was made within the time, and his proceedings to collect should be, on their face, within the time limited. So, also, the act authorizes the proceedings to be had against the steamboat, or other water craft, in the county only, where she may at the time lie, having arrived at the landing, port, or place of destination, to which she has been freighted; all of which ought to be proven to the court, and, therefore, suitably averred. Whilst, therefore, we hold, that the party did swear to all the act requires to be sworn to, yet, in our judgment, the affidavit does not bring the plaintiff's case within the provisions of the act of 1841, and is, therefore, insufficient. Accordingly, the first ground of error is overruled.

The second assignment of error goes upon the ground that the defendant was too late with his motion to quash, because the act points out the mode in which he shall make his defence, and to that mode he is confined. The act declares that the "owner or other person, having control of any steamboat or other water craft, against which any proceedings may be had, under the foregoing provisions of this act, and who may be desirous of contesting said claim or demand, on the ground that the same or some part thereof is not due and owing, he, she, or they, shall file his, her, or their affidavit, denying that the whole, or some part thereof, was due at the time the applicant filed his affidavit," &c. The statute proceeds to require what is admitted to be due to be paid, where only a part is denied to be due; and upon good security being given for the eventual condemnation money and costs, the property levied upon is to be delivered up; the papers are to be returned to the next court in the county, to which the execution is returnable, when an issue is to be made up and tried by a jury. This is the mode of defence to which it is contended the defendant is confined. The argument is, that inasmuch as the statute provides one mode of defence, no others are allowed. That is true, so

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far as the contest about the amount due is concerned. The defendant can contest the amount due upon no other plan but that provided in the act. He is concluded as to that by the Legislature: if, at the proper time, and in the manner designated, he fails to contest the amount due, he cannot afterwards, or in any other manner, be heard as to that matter. But the motion to quash, which gave rise to this writ of error, does not contest the amount due; it is in the nature of a motion to arrest the judgment, because, from the plaintiff's pleadings, it does not appear that he has any cause of action against the defendant. It cannot be contended that, because the defendant in any action is entitled to defence upon the merits, he is, therefore, precluded from any right to move in arrest. We think that, notwithstanding the defence given in the statute, the right to quash the execution, upon any other legal grounds, remains to the defendant.

We therefore affirm the judgment of the court below, upon both assignments.

No 53.—MATTHEW K. POOL, plaintiff in error, *vs.* TIMOTHY G. MCCRARY, WILLIAM P. COLEMAN and MILLY COLEMAN, defendants in error.

Although an instrument contains, at the foot of it, a memorandum specifying the mode in which it may be discharged, still, if it be for a sum certain, payable, absolutely and unconditionally, on a day fixed on the face of it, it is a good negotiable promissory note, and may be declared on as such.

This was an action, tried upon a general demurrer to the declaration, on the appeal, before Judge Alexander, in the Superior Court of the county of Muscogee, at May Term, 1846. The action was originally brought to the Inferior Court of said county, and was demurred to and dismissed on an alleged insufficiency in the declaration, which is as follows:

GEORGIA, }
Muscogee County. } To the Honorable the Inferior Court of said county:

The petition of Matthew K. Pool, who sues to and for the use of John S. Thomas, respectfully sheweth, that Timothy G. McCrary, William P. Coleman, and Milly Coleman, of said county, are justly indebted to your petitioner in the sum of one thousand dollars, besides interest: For that whereas, said defendants heretofore, to wit: on the ninth day of August, in the year of our Lord eighteen hundred and forty-three, to wit, in the county aforesaid, made and delivered to your petitioner their certain instrument in writing, commonly called a promissory note, the date whereof is the day and year aforesaid, and which is now here shown to the court whereby they promised to pay M. K. Pool, [meaning and intending your petitioner,] or bearer, on the first day of January, then next, c

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said dollars for value received, [written "rec'd,"] which might be discharged, by releasing the said Pool [meaning your petitioner] from an endorsement [meaning and intending of your petitioner] on a note, made by W. W. Pool to the Central Bank of Georgia, for fourteen hundred dollars, dated on the 27th [meaning and intending on the twenty-seventh day of] December [then] last, [past,] and running to maturity, said note also endorsed by Robert McCrary. And your petitioner avers, that said note, on which was said endorsement of your petitioner, was not for said sum of fourteen hundred dollars, and dated on said twenty-seventh day of December, then last, to wit, eighteen hundred and forty-two, as, by mistake, erroneously described in the note herein set forth and sued upon, made by said defendants, [and here shown to the court,] but was for the sum of fourteen hundred and eighty dollars, and dated on the fourth day of May, eighteen hundred and forty-three; and your petitioner further avers, that neither said defendants, nor any one else, have released him from his said endorsement, nor is he released from his liability on the same, or any part thereof; but that he is still bound thereon, and is now impleaded before this honorable court for his liability on the same. And your petitioner avers further, that said note, herein specified and set forth, has not been discharged by releasing said Pool, your petitioner, from his said endorsement on said note, made by the said William W. Pool to the Central Bank of Georgia, for fourteen hundred dollars, nor by releasing said Pool, your petitioner, from any other note on which he was endorser, made by said William W. Pool to the Central Bank of Georgia.

And your petitioner further sheweth, that said defendants, heretofore, to wit: on the ninth day of August, in the year of our Lord eighteen hundred and forty-three, to wit, in the county aforesaid, made and delivered to your petitioner their certain other instrument in writing, commonly called a promissory note, the date whereof is the day and year last aforesaid, [which is here shown to the court,] whereby they promised to pay M. K. Pool, [meaning and intending your petitioner,] or bearer, on the first day of January, then next, one thousand dollars for value received, which might be discharged by releasing the said Pool [meaning and intending your petitioner] from an endorsement [meaning and intending of your petitioner] on a note made by W. W. Pool, to the Central Bank of Georgia, for fourteen hundred dollars, dated on the 27th [meaning and intending on the twenty-seventh day of] December [then] last, [past,] and running to maturity, said note also endorsed by Robert McCrary, [meaning and intending that said note was also endorsed by one Robert McCrary.] And your petitioner avers, that the said note, herein specified, has not been discharged by the releasing of your petitioner from his said endorsement on said note of fourteen hundred dollars, made by said W. W. Pool, to the Central Bank of Georgia, on which your petitioner, and one Robert McCrary are endorsers, nor by releasing your petitioner from any of his endorsements made on any other notes of the said W. W. Pool to the Central Bank of Georgia. Yet the said defendants, although so liable and indebted, and notwithstanding their said undertaking and promise, have not paid the said sum of money in said note specified, or any part thereof, although thereunto often requested; but the same to pay, any part thereof, have hitherto refused, and still do refuse, to the said of your petitioner two thousand dollars. Wherefore your peti-

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tioner brings suit, and prays that process may issue, requiring the said defendants, personally or by attorney, to be and appear at the next Inferior Court, to be held in and for said county, then and there to answer your petitioner in an action of debt, &c.

THOMAS & DOWNING, Plaintiff's Attorneys.

The court below, after hearing argument upon the said demurrer, dismissed the case for insufficiency of the aforesaid declaration, to which the counsel for plaintiff in error excepted; and assigns for error, that the court below erred in dismissing said cause, for that the declaration aforesaid is good and sufficient in law, and that the instrument sued upon is a promissory note, as set forth in said declaration, and the court below erred in ruling to the contrary.

GRIGSBY, E. THOMAS, for the plaintiff in error,

Insisted that the instrument declared on was a promissory note, and the declaration sufficient, and read from *Bayley on Bills*, from page 4 to 14, and the notes; also, 8 *John. Rep.* 485; 9 *ib.* 120; 19 *ib.* 144; 7 *Mass.* 240; *Prin. Dig.* 426; also, *Dudley's Geo. Rep.*

ALFRED IVERSON, for the defendant in error.

The instrument sued upon, being conditional, or in the alternative, giving the maker the election to pay the amount specified, or to discharge a certain other obligation therein described, cannot be considered a promissory note, and must be sued on as a special agreement.—*Story on Bills*, 55 to 57, and cases there cited; *Chitty on Bills*, 154-5; 3 *Kent's Com.* 76; 5 *Comyn's Dig.* 77, tit. "Merchant;" 3 *Lord Raym.* 77, cited in 2 *Law Reg.* 1362 and 1396; 5 *Term Reports*, 483.

By the Court—LUMPKIN, Judge.

By the statute of *Anne*, a paper was not good, as a promissory note, unless the same was payable in money absolutely and at all events. By the act of this State, it is allowable to make it payable in money, merchandize, or any other thing.

By an examination of the instrument sued on, we hold, that it wants none of the essential qualities of a negotiable note, and that it was right to declare on it as such. It is for the absolute and unconditional payment of one thousand dollars, on a day fixed on the face of it. There is a note or memorandum subjoined to the foot of it, specifying one of the modes in which it may be discharged by the defendants. In the case of *Ogden vs. Bacon*, (8 *John. Rep.* 685,) A. gave to B. a promissory note, payable to B. or order, and at the same time made an endorsement on the note, that it was to be delivered to B. in consideration of a judgment against C., to be assigned to A. by B.; it was held by the court, that this was a promissory note within the statute, and might be declared on as such, notwithstanding the endorsement, which was merely to show the consideration, and to operate as notice, to whoever might purchase the note.

Judgment reversed.

No. 54.—BENNETT CRAFTON, executor of **JAMES BEAL**, deceased, plaintiff in error, *vs.* **NATHAN BEAL**, adm'r., and **MARTHA BEAL**, adm'x. of **ROBERT BEAL**, deceased, defendants in error.

The testator left a will, naming several executors, to whom he bequeathed in trust for certain grandchildren a portion of his estate. One of the executors only qualified; and, receiving the trust property, afterwards died intestate, before the trust, thus devolved on him, was entirely executed. After his death, another of the executors named in the will came forward, and qualified within the twelve months provided by statute. The last-qualified executor is entitled to the possession of the unadministered portion of the trust estate, and not the administrator of such deceased executor.

The administrator of a deceased executor is not the representative of his testator.

This was a bill in equity, dismissed upon demurrer, before Judge Alexander, in Muscogee Superior Court, at May Term, 1846.

The facts shown by the bill, so far as they are material to this question, being stated in the opinion of the Supreme Court, it is deemed unnecessary to set them forth here.

HINES HOLT and G. E. THOMAS, for the plaintiff in error.

HENRY L. BENNING, for the defendants in error.

By the Court—WARNER, Judge.

It appears, from the record in this case, that James Beal, late of the county of Richmond, departed this life, leaving a will, whereby he disposed of his property, and appointed Robert Beal, Walton Harris, and Bennett Crafton, his executors, to execute the same. By one clause of the will of the testator, he bequeathed certain property to his executors, in trust for his two grandchildren, Elizabeth Tankersly Crafton and Samuel Bennett Crafton, to be distributed, as they should marry or become of age. Robert Beal, only, qualified as the executor of James Beal; the other two executors did not qualify. Before the trust was entirely executed by the executor, Robert Beal, under the clause of the will above mentioned, he departed this life, in the month of June, 1840, *intestate*, in the possession of the said trust estate. In the month of September following the death of Robert Beal, Bennett Crafton, one of the executors of James Beal, came forward, and qualified as such executor. Martha Beal, the widow of Robert Beal, the first-qualified executor of James Beal, took out letters of administration on the estate of her deceased husband, and thereby became possessed of the trust property belonging to the estate of James Beal. Afterwards, she intermarried with Nathan Beal, who became administrator of James Beal, in right of his wife Martha. Bennett Crafton, as the executor of James Beal, filed his bill against Martha Beal, administratrix of Robert Beal, and Nathan Beal, administrator of said Robert, in right of his wife, to account for, and pay over to him, the trust property in their hands, belonging to the estate of James Beal. To this bill the defendants made general demurrer, for want of equity. On the part of the defend-

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ants in error, it was insisted, that inasmuch as the qualified executor, Robert Beal, died in possession of the trust property, the defendants, as his administrators, have the right to retain it, and execute the trust, as directed by the will of James Beal; and so the court below decided, and sustained the demurrer, and dismissed the complainant's bill, which decision of the court below is now assigned for error in this court. We are of the opinion, the court below committed error, in sustaining the demurrer and dismissing the complainant's bill. By the will of James Beal, the execution of the trust therein specified devolved upon his executors, in whom the testator is supposed to have had confidence. The death of Robert Beal, the only qualified executor, does not deprive the other executors from qualifying, and executing the trust, in accordance with the intentions of the testator, provided they do so within the time prescribed by the act of 1810.—*Prin. Dig.* 239. The act of 1810 was intended to reach just such cases as the one now before us, as its preamble declares: "Whereas, it frequently happens that a person appoints, in his last will and testament, two or more executors, one of whom, only, qualifies under the said will; and if such qualified executor dies, the other executors, nominated in the will of the testator, cannot qualify, by which means the estates of the testator are placed in the hands of an administrator *de bonis non*, with the will annexed, and the *person in whom the testator confided prevented from acting*; for remedy whereof, Be it enacted, that from and after the passing of this act, it shall and may be lawful for any executor, named in the will of the testator, to qualify under the said will, at any time; provided the qualification of one or more takes place within twelve months after the decease of the testator; provided, also, that the executor and executors, who do not qualify within twelve months from and after the decease of the testator, one of whom shall do so, within twelve months after the decease of the only qualified executor." It is admitted, the executors qualified within the time prescribed by the statute. But the defendants in error are not even administrators *de bonis non*, with the will annexed, on the estate of James Beal; they are only administrators on the estate of Robert Beal, and yet claim the right to execute the trust devolved on the executors of James Beal, by his last will and testament, as against one of those executors who is the plaintiff in error. The administrators of Robert Beal do not represent the estate of James Beal; although Robert was the qualified executor of James, even if there had been no other executor but Robert. "If the first executor dies *intestate*, then his administrator is not the representative of the testator; but an administrator *de bonis non* of the original testator, must be appointed by the ordinary."—1 *Williams' Exrs.* 133-4; *Toller's Law of Exrs.* 63-9. We are, therefore, of the opinion, that the plaintiff in error, as the qualified executor of James Beal, deceased, is entitled to the possession of the trust property, for the purpose of executing the trust devolved upon him by the last will and testament of the testator. Let the judgment of the court below be reversed, and the cause reinstated.

No. 55.—ELIZABETH WRIGHT, executrix of the last will and testament of JAMES. H WRIGHT, deceased, defendant in execution, and BOND and MURDOCK, claimants and plaintiffs in error, vs. WM. ZEIGLER, defendant in error.

The SAME vs. SIMON HENDERSON, defendant in error.

The SAME vs. DANIEL SMITH, defendant in error.

The questions, both of law and fact, involved in the above three cases, being precisely the same, they were, by consent of parties, consolidated, and tried together as one case.

An executor under a will authorizing the sale of property of the testator to pay debts, but without specifying the manner of sale, may dispose of slaves of testator at *private sale*, and without any previous advertisement of such intended sale, or leave of the Court of Ordinary, and the purchaser at such *private sale* will acquire a good title, even as against the creditors of the testator; provided that the purchase is *bona fide*, and without fraud on the part of the purchaser.

The purchaser, in such case, is not bound to see to the proper application of the purchase-money by the executor. "What becomes of the price, is of no concern to him." Nor is he required, before buying, to look into the accounts of the executor, to ascertain that he is faithfully administering his trust. The law presumes this in favor of the executor. But in all cases where the sale is infected with *fraud* and *covin* between the executor and purchaser, it is absolutely void, and the title to the property remains unchanged.

These were claim cases, tried before Judge Floyd in the Superior Court of the county of Crawford, at February Term, 1846. They were founded upon levies made upon certain slaves, as the property of the estate of James H. Wright, deceased, by virtue of executions against Elizabeth Wright, as executrix of the last will and testament of said deceased, founded upon debts of the testator. The slaves, so levied on, had been sold by said executrix to the claimants, who were creditors of said deceased, to the amount of half the purchase-money; said sale having been made in May, 1842, before the judgments were rendered, and not at public outcry, and without notice of any kind.

Upon the trial of these causes in the court below, the counsel for the claimants offered, and read in evidence, the will of said deceased, which, among other provisions, contained the following items, to wit: "I wish the notes and accounts now in my hands, to be applied by my executors to the payment of my just debts; and if those should not be sufficient for that purpose, then it is my will and desire that a sufficient portion of my estate, real or personal, as my representatives shall deem most advisable, be sold to pay my debts." It appeared that two of the executors named in the will refused to qualify, and that the executrix alone represented the estate. It also appeared that the notes and accounts were wholly insufficient to pay the debts of the testator.

It being held by the court that the contingency had happened, making a sale of the property of the testator to pay his debts, the

counsel for the claimants offered in evidence their respective bills of sale for the property in dispute, from the said executrix, executed under the sale aforesaid. To which the counsel for the plaintiffs in execution objected, on the ground that it appeared, from the testimony, that said sale had been made privately, and without the statutory notice, and without said property being exposed to public outcry and sale. Whereupon the court below sustained the objection, upon the ground that the executrix had no authority at private sale, and that no title could vest in the purchaser, except after advertisement and public sale; and verdicts were thereupon rendered, finding the property subject, and the claimants excepted.

WASHINGTON POE, for the plaintiffs in error.

At common law, an executor has the entire and complete control and direction in relation to the assets of the testator. He may release, sell, or give away his goods, &c.—*Office of Ex.* 34. The goods of the testator are considered his, the executor's, from the death of the testator.—*Ib.* 35; 4 *Munford*, 196, *Monroe vs. Garmes*.

The executor derives all his title from the will.—*Toller*, 45. An executor may sell the property of his testator for his own debt, and if the purchaser buys *bona fide*, neither a specific legatee, heir nor creditor can pursue the property in the hands of such purchaser.—1 *Atkyns' R.* 463, *Nugent vs. Gifford*; 3 *Atkyns*, 235, *Mead vs. Ld. Orrery*; 7 *Johns. Ch. Rep.* 150; 2 *Rand. Rep.* 294; 4 *Rand. Rep.* 576. The doctrine in *Nugent vs. Gifford* received the sanction of Lord Mansfield.—*Whale vs. Booth*, 4 *T. R.* 635.

The doctrine in *Nugent vs. Gifford*, sustained by Chancellor Kent.—7 *Johns. Ch. Rep.* 21, *Sutherland vs. Brush*.

The doctrine in *Nugent vs. Gifford*, sustained by Judge Story.—2 *Story's Eq. sec.* 1129.

Nor is it necessary for the purchaser to see to the application of the purchase money.—1 *Cox's Rep.* 145, *Bonury vs. Ridgard*; 2 *Dick. Rep.* 725, *Scott vs. Tyler*; 2 *Story's Eq. sec.* 1128; 7 *Johns. Ch. Rep.* 150, 159.

A chancery guardian may in his discretion sell the personal property of his ward, for the purposes of his trust, without any previous order of the court, if the court would have directed the sale on application.—7 *Johns. Ch. Rep.* 154, *Field vs. Schieffelin*.

But doubtless the defendants in error will rely upon the statute of Georgia of 1829, (*Prin. Dig.* 254, sec. 118,) authorizing the courts of ordinary to order sales of slaves belonging to testator's estates. In support of claimant's title, we hold, that the statute only applies to cases in which the testator omitted to order a sale in his will.—4 *Eq. Rep.* 522, 527, *Saxon and Wife vs. Barkerdale and Garrett*.

There is no other statute of Georgia requiring executors to expose the slaves of testators at public sale or to advertise such sales.

The fourth section of the statute of executors and administrators is in reference to the sale of goods and chattels, which terms do not include *slaves*, but have always been held to apply exclusively to *disposable property of testators and intestates*.

The forty-fourth section of same act, fixing the time of sales, refers alone to such sales as are ordered by the court of ordinary; and in respect to executors applies solely to the sale of land.—*Prin. Dig.* 234.

The forty-fifth section of said act applies to slaves held by administrators, and the omission of executors in that act, goes far to sustain the conclusion, that they had a discretion in the sale of such property.—*Ib.* The case of *Sazon and Wife vs. Barksdale and Garrett*, (4 *Eq. Rep.* 527,) held that the statute of South Carolina was applicable, because there was no authority in the will to sell.

As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will, to executors to sell lands for payment of debts; so far as to protect a purchaser for a valuable consideration.—2 *Munf. Rep.* 129; *Roberts' widow and heirs vs. Staunton*.—See *Judge Tucker and Flemming's Opinions*, 134, 139.

And even if our law of executors and administrators contained a provision requiring a sale at public auction, yet the remedy for a violation would be against the executor, and not the purchaser, if there was no fraud in purchaser.—*Hudson and others vs. Hudson, admr.* 5 *Munf.* 181, 183.—See 3 *Munf.* 1, in which the case went off on a different point; but Mr. Wickham admitted the point for which we contend.

AMOS W. HAMMOND, for the defendants in error.

1st. This case is not governed by the statute or common law of England. Our colonial statute of 1764, (*Prin Dig.* 223,) which regulates this subject, was passed twenty years before the adopting statute, (*Prin. Dig.* 570,) and therefore, although we admit that an executor in England or by the English law would have the unquestionable right to sell the property of the testator, without any notice by advertisement, or otherwise, and where and when he pleased, and to whom he pleased, yet that right has not existed in Georgia since February, 1764, because at that time our colonial Legislature passed the law requiring all intended sales by executors or administrators to be advertised, &c., &c.

2d. In no case by the laws of Georgia can an executor or administrator sell property of the testator or intestate without first obtaining an order for that purpose from the Court of Ordinary, unless by will a testator gives his executor such right by express words in his will; and that this power can be given to an executor by an *insolvent* testator, where such power would prejudice the rights of creditors, is, to say the least of it, very questionable; for a testator, if he can give such right, might authorize an irresponsible relation to sell his property in Alabama or Mississippi privately, and, giving no security for the faithful performance of his acts, might thus legally defeat the rights of creditors. The rule of law, governing the time, place and manner of sale, should therefore be followed by the executor.

Now, to ascertain whether the bill of sale, offered by claimants in the court below, was properly or improperly rejected, we must first look to the object of the law, requiring these sales to be advertised for sixty days, and then to be had at the court-house door, and on the first Tuesday in the month, and providing for continuing the sale from day to day giving public notice of such intended continuance before four



o'clock of the afternoon of the first day of sale. 1st. The policy of this law was to have the sale under such circumstances as to make the property intended to be sold, bring the very highest price for the benefit of those concerned. 2d. That creditors of an insolvent estate might have an opportunity, if they wished to buy the property; that a fair competition amongst the bidders brought to the sale by the notice might be induced, and the estate consequently sell for more, and the creditors and heirs be thereby benefited.

But, suppose the court does not see any object, sufficient to have induced the Legislature to have made any notice, or other preliminary step necessary, still, if the statute requires any preliminary step to be taken, by the executor, before the sale, this court ought to decide, in the absence of proof, that this step was not taken by the executor, and the court did right to reject the bill of sale, which of course was illegal, unless the law, under which the sale was had, was first complied with.

May it please the court: What is the duty of an executor, upon taking upon himself the burthen of the execution of his testator's will? 1st. He is to be governed in all things by the will, so far as it speaks explicitly, unless it requires him to do something against, or to abstain from doing something required by, law. It is said the will is the law of the executor, but this is only true with this qualification, that whenever the testator expresses his will clearly, and this is not contrary to law, or conflicting with the rights of creditors, or others interested, then the *will* is the law of the executor, otherwise not. In other words: When the will requires an executor to do a particular thing, without specifying the *manner*, (as in this case,) then, whether the executor has the right to do that thing in a particular way, must entirely depend on the question whether the manner, selected by the executor, is regulated by law or not. If the *law be not silent* as to the *manner, time* and *place*, although the *power* to sell be ever so *clear*, still it is the duty of the executor to sell in the *manner*, and at the *time* and *place* prescribed by law. And if the law require a particular *time* and *place*, and a *particular manner* of sale; and the testator order a *sale* in a *different manner*, or at a *different time* or *place*, then the *law* must govern the executor, and not the *will*. Otherwise an insolvent debtor might order a sale, and legally *commit* a fraud, and waste an estate, without security to creditors, or means in their power to prevent it.

After probate of the will, and qualification of the executor, the creditors give notice of their demands, and, in cases of insolvency, look out for an order to sell the slaves, if any. They ask the executor, Do you intend to sell the negroes? In this case, he answers, The will requires me, first, to ascertain whether the notes and accounts will pay the debts, and, if not, then I will sell. Well, the executor finds the estate insolvent, and determines to sell the slaves. A lawyer advises the executor, If you *intend* to sell the slaves, you must get an order of the Court of Ordinary; but the executor says, I *have* the *power* given me to sell what I please, whenever I find a sale necessary, in order to pay the testator's debts. Then he is advised, If you have the power to sell, go on and do so. But the next inquiry is, How? To whom, where, and when shall I sell? Why, just as the testator directed you; for his *will* governs you, under your oath, and is your law. But the executor

looking to the will, finds that no direction is given as to the *time, place, or manner*. Then where does he go for instruction? To his own discretion, or the law? Will he sell privately, or endeavor, by a public sale, after due notice, sixty days, to get the best price that competition will produce? Will he sell at the court-house, in the county, publicly? Or will he take the negroes to the State of Alabama, or Mississippi, and sell privately? The law answers these questions.

My brother Poe read from 7 *Johns. Ch. Rep.* 154. This case only goes this far, that in case where the Court of Equity would have granted a right to sell in the first instance, if it had been applied to for leave, it would confirm what was done in that case, without leave first having been had and obtained, where confirming the thing done would not conflict with the law, or the rights of third persons. But if application had been made to the Court of Ordinary, for leave to sell the slaves of Wright *privately*, out of this State, in the country, or without any advertisement, *would that court—could that court have granted any such leave to sell?* My brother Poe says, that slaves are not such personal property as contemplated, in the statute of Georgia, from which he read. Can this position be true?

I will conclude by remarking, that the second position I laid down, I still believe to be correct, to wit: that in all cases of intended sales, by an executor or an administrator, the rules of law, governing the *manner, time and place, must be followed*, even though the testator point out a *mode, time and place*.

ANGUS M. D. KING, for the defendants in error, in conclusion.

The requirements of our statute (*Prince*, 223, 224) are not only explicit, but they are salutary; they require sales by executors and administrators to be publicly advertised for a length of time; to be had at the court-house of the proper county, on the first Tuesday of the month, and between the usual hours of sale: these are the most material. Here the testator is silent as to the *manner* of sale, by his representatives, as they are called in the will; and we must presume his intention to be, that the sale should take place according to the rules prescribed in the statute, which are notorious and familiar to every one. This, we contend, is the only reasonable construction to put upon the intention of the testator.

Here nothing of the sort was observed: a valuable estate has disappeared, and, except the parties to secret sales, no one can tell where, or how, or for what consideration the thing has been done. Not only have heirs and creditors a deep interest that the law should be enforced to the full extent of its spirit and meaning, but to its very letter; but we might add, that even the community in which a man has lived, have some right to know that his estate has not been squandered or embezzled. The good effect of the law is everywhere observable in the sale of estates, and there is no one of its requirements that should not be enforced to the full by the courts of the country.

SAMUEL HALL, in conclusion for the plaintiffs in error, after briefly stating the facts of the case, as presented by the record, argued as follows:

In the examination of the questions presented in this case, it will be necessary to inquire, in the first place, from what source the executor derives his authority?

2d. What were the executor's powers, at common law, over the assets of his testator?

3d. What are the rules which govern in the construction and execution of powers?

4th. How far the executor's powers at common law over the assets of his testator are modified by the acts of 1764 and 1829?

5th. How far a purchaser's title is to be affected by any irregularity in the sale, when the authority to sell is clear; and whether the court, in a suit with a stranger, will inquire collaterally into such irregularity?

This inquiry will lead to the following conclusions, which we shall here state as our grounds of exception to his Honor's opinion:

1st. The executor acts under, and derives his authority from, the will, and not from the Court of Ordinary.

2d. That at common law, the executor was in many respects, and for many purposes, to be considered by third persons as the absolute owner of his testator's personal estate. That he might dispose of legacies specifically bequeathed, and that the legatee or creditor could not follow the assets in the hands of the purchaser, without first showing collusion. That some cases hold, that he may sell, pledge, or mortgage assets in payment of his individual debt. That he may sell, pledge, or mortgage, for the purpose of paying his testator's debts, all the cases hold. That the power of sale was incident to the office of executor, and lastly, that the purchaser is not bound to see to the application of the purchase-money.

3d. That where power is conferred in general terms, without specifying any mode in which it is to be executed, and there is more than one mode of carrying it into effect, it is at the option of the donee which mode he will take.

4th. That the act of 1764 does not regulate the sale of slaves, and that the act of 1829 only modifies the executor's common law power over his testator's assets, so far as to take away from him the power of selling, which was incident to his office, and make it his duty, where the will is silent upon the subject, to apply to the Court of Ordinary for its order and direction, and that it is only such sales as the court must and does order, that the statutes require to be made at public auction, &c.

5th. That where the authority to sell is clear and unquestionable, the purchaser will not be affected by any irregularity in the sale; and in a suit with a stranger, the court will not permit such irregularity to be inquired into collaterally.

And first, that an executor acts under and derives his authority from the will, and not from the Court of Ordinary, is evidenced from the fact that he may (without incurring any of the consequences to which an executor *de son tort* is liable) perform many acts, before proving the will, and taking out testamentary letters, "such as making an inventory; taking possession of the testator's effects; taking security for debts due to the deceased; removing goods; paying and releasing debts owing from the estate; receiving and releasing debts owing to it; selling giving away, and otherwise disposing of, the goods and chattels"

testator; assenting to and paying legacies; commencing actions in testator's right; and indeed almost every act incident to his office; and this, too, as a consequence of the principle that his title is derived from the will, and takes effect the instant of the testator's death."—*Toller*, book 1, ch. 2, sec. 4.

But what is an executor? "An executor," says *Toller*, book 1, ch. 2, sec. 1, "is he to whom the execution of a last will and testament of personal estate is by the testator's appointment confided." From this definition it is clear that he is appointed to carry out the will. In the performance of his duty, then, he must look to the will; this is his guide, and this is his law; from this source, and this source alone, his authority is derived.

This view is greatly strengthened by our own statute, and the oath he is required to take; that oath obliges him (see *Prin. Dig.* 227) well and truly to execute the last will and testament of his testator, by paying, first the debts, and then the legacies, contained in said will, so far as the goods and chattels of the testator will thereunto extend, &c. Now, what was the executrix in this case sworn to do? Why, to execute her testator's will; and that will required her to apply the notes and accounts in the testator's hands at his death, to the payment of his debts; and if they were insufficient for that purpose, then she was obliged, by the solemn oath she had taken, to carry out his directions, and sell such of his estate as she might deem most advisable, for the payment of his debts; and under circumstances so solemn, and for the very purpose mentioned in this will, after the insufficiency of his notes and accounts was ascertained, three slaves, Venus, Jim, and Mariah, were sold to the plaintiffs in error. But her authority to sell at all is not questioned. His honor admits she had authority from the will to sell, but denies her right to sell in the manner she did. Now, the will does not require her to sell in any particular manner; and it follows, that if his honor is correct, there must be something in the common or statute law, directing the manner in which she shall sell under such circumstances. Let us in the first place see if his honor's authority is derived from the common law.

We have already said, that at common law an executor might sell or pledge legacies specifically bequeathed, and that such sale would confer a valid title upon the purchaser, and that where no collusion was shown, the court would not follow the assets into the hands of the purchaser. This view is supported by *Humble vs. Bill*, 2 *Vernon's Ch. Rep.* 444. These were the facts of that case: "Bill, having a term of twenty-one years in the printing-office, devised, (amongst other things,) that £2,000 should be raised out of the printing-office for his daughter, the wife of Darcy Savage, and their children; and made one Garrett executor, who first mortgaged the term to Dr. Brown, and the same was afterwards assigned to Sir William Humble for £1,800. Now, "it was insisted" (and this we beg the court to bear in mind) "that here was no occasion to sell to pay debts, and Sir William, having notice of the will, was to take the estate subject to the £2,000. But the court was of opinion, that the executor of a testamentary estate had the power over it, so as to alien or sell, as he should judge necessary, and that if he sold in preference of residuary or specific legatees, they might have their remedy

against the executor, but not follow the estate into the hands of the purchaser; for, should that be allowed, no one would venture to buy of an executor, for it would be unreasonable that a purchaser should take upon him to make out the *quantum* of the *debts* or *assets*, nor is he entitled to have the *vouchers* to make out such an *account*; and if such difficulties be put upon purchasers of chattels, &c., from executors, it will follow that executors will be under an incapacity, and disabled to sell, though there be never so much occasion for it to pay debts; and the court decreed an account to the plaintiff, (*Sir William Humble*), of the rents and profits, and to hold and enjoy the printing-office, and the defendants to redeem or be foreclosed." *En passant*, it may be remarked that this case makes the executor the entire judge of the necessity for a sale, and does not even make it incumbent upon the purchaser to inquire into the necessity; indeed, it seems to hold such a thing altogether improper, and this, too, it must be remembered, in a case where the purchaser was charged with knowledge of the fact that the property was taking a direction contrary to that given it by the testator himself.

Although this decree was reversed upon appeal to the House of Lords, it was subsequently set up in *Ewer vs. Corbet*, 2 *P. Williams' Rep.* 148. In this last case, after noticing the reversal of *Humble vs. Bill*, the Master of the Rolls proceeds: "But since that time, I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy but against the executor to recover the value thereof, if there be sufficient assets for the payment of debts." So far, this case decides that the devisee has a remedy only against the executor, and that this remedy depends upon the sufficiency of the assets to pay debts; if they are sufficient, the devisee has his remedy, not against the purchaser, but against the executor; if they are insufficient, he has no remedy, either against the purchaser or executor.

But, again: this case decides "that it is not reasonable to put every purchaser of a lease from an executor to take account of the testator's debts; nor has he any means to discover them." "On the contrary, as the whole personal estate of the testator is liable to the debts, his lease must (*inter alia*) of necessity be liable, and therefore may be sold by the executor." From this it is most apparent, that it is not to be presumed that the purchaser had notice that there were no debts; and the burden of proving this fact is not upon him, but upon the devisee; and the devisee must also prove other circumstances, going to impeach the fairness and honesty of the transaction. The Master of the Rolls admits, in this case, if an executor should sell a term for an under value, or to one who has notice that there are no debts, or that all the debts are paid, that this might be another consideration. This case, then, does not decide that such circumstances would avoid the sale, and vacate the purchaser's title; there were no such ingredients in the case, and a decision of the point was unnecessary.

In *Burting vs. Stonard*, (2 *P. Wms.* 150,) a sale of a residuary or general legacy was sustained; and the decision in *Ewer vs. Corbet* affirmed.

Mr. Justice Story (2 *Com. Eq. Juris.* §§ 1128, 1129, 1130) reviews these decisions, and approves of them.

We shall, however, have occasion to examine this last authority more particularly when we come to speak of the obligation of the purchaser to see to the application of the purchase-money. In the mean time, we shall endeavor to show, as we have asserted, that some cases hold, that the executor may assign, pledge, mortgage, or sell, in payment of his own debts; and that such assignment, pledge, mortgage, or sale, will confer a good title upon the assignee, mortgagee, pledgee, or purchaser, where a contrivance to commit a *devastavit* is not shown.

We shall merely refer to these authorities by name, and recite their substance, reserving the right, if need be, to read them to the court.

In *Nugent vs. Gifford*, (1 *Atkyns*, 463,) it is decided, that where an executor assigns over a mortgage term of his testator to A, as a satisfaction of a debt due to A from the executor, that this is a good alienation, and A shall have the benefit of it, against the daughters of the testator, who were creditors under a marriage-settlement. At law, an executor may alien the effects of the testator, and when aliened, no creditor can follow them; and where the alienation is for a valuable consideration, this court suffers it, as well as at law. "No difference in this court between the power of an executor to dispose of equitable and legal assets." An assignment by an executor of a testator's assets to a person who has a sum of money *bona fide* due, is as valuable a consideration as money paid down."

Mead vs. Lord Orrery (3 *Atkyns* 236) supports the case of *Nugent vs. Gifford*, and holds, that there is no instance of an assignment made by an executor, for a valuable consideration, being set aside in a Court of Chancery, unless it has been done collusively. In *Whale vs. Sir Charles Booth*, Lord Mansfield follows Lord Hardwick's decision in *Nugent vs. Gifford*, and *Mead vs. Lord Orrery*. This case is to be found in a note to *Farr vs. Newman et al.*, 4 *T. R.* 625. This latter case holds, that the property of testator in the hands of an executor cannot be levied upon by an individual creditor of the executor, by three justices against Buller, J., who held that they might; but neither of the three foregoing cases is overruled or shaken by *Farr vs. Newman*, so far as a voluntary alienation of assets by the executor is concerned.

There are, however, cases qualifying and limiting the doctrine here laid down: the first is *Crane vs. Drake*, decided in 1708, 2 *Vernon*, 615; *Andrew vs. Wrigley*, decided December 1, 1792, 4 *Bro. C. R.* 125; *Hill vs. Simpson*, decided by Sir William Grant, Master of the Rolls, in 1802, 7 *Vesey*, 152; *Taylor vs. Hawkins*, 8 *Vesey*, 209, decided by Sir William Grant, in 1803; *McLeod vs. Drummond*, 14 *Vesey*, 353, decided by Sir William Grant, in 1807—confirmed, upon appeal, by Lord C. Eldon, 17 *Vesey*, 150, in 1810; *Kean vs. Roberts*, 4 *Madd. C. R.* 332, decided by Sir John Leach, Vice Chancellor, in 1819.

This latter case states the result of all the authorities to be, that a purchaser is not bound to inquire into the circumstances of testator's estate, in order to ascertain whether there is a necessity for a sale. That, generally speaking, a purchaser does not become a party to a breach of trust, or *devastavit* by an executor, by buying, or receiving as a pledge, for money advanced at the time, assets, whether specifically given by the will, or otherwise; because this sale, or pledge, is held to be *prima facie*, consistent with the duty of an executor; but that, gen-

Bond & Murdock et al. vs. Zeigler et al.

erally speaking, he does become party to a breach of trust, by buying, or receiving in pledge, any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale, or pledge, is, *prima facie*, inconsistent with the duty of an executor." *Southerland vs. Brush*, 7 Johns. C. R. 17, decided by Chancellor Kent, in 1823, follows *Nugent vs. Gifford*, &c.; it is, however, overruled by *Colt vs. Lasnier*, 9 Cowen, 320, which follows *Kean vs. Roberts*; and indeed the doctrine of this latter case seems to be sustained by Chancellor Kent in *Field vs. Schieffelin*, 7 Johns. C. R. 150.

The result of all these authorities is most fully, satisfactorily, and ably stated by Justice Story, in the 1st Com. Eq. Juris. §§ 579, 580, and 581. From these decisions it follows, that a purchaser is not bound to see to the application of the purchase-money, and that where there is no fraud, the assets cannot be followed by a legatee or creditor.—2 Story's Eq. Juris. §§ 1127 to 1132, and the cases there cited.—*Field vs. Schieffelin*, 7 Johns. C. R. 150.

And it also follows, from the foregoing principles, that for many purposes, and in many respects, executors are to be considered, by third persons, as the absolute owners of testator's personal estate.—*Griffith vs. Frazier*, 3 Peters' Con. R. 93; *Hill vs. Simpson*, 7 Vesey, 152; 1 Story Eq. Juris. § 579; *M'Leod vs. Drummond*, *ut supra*, and that the power of sale is incident to the office of executor.—7 Vesey, 152.

It may be safely affirmed, that no case can be found, where property sold by an executor in payment of a testator's debts has been followed in the hands of a purchaser. Let it be remembered, that the greater portion of the purchase-money in this case, was paid by the claimants in demands which they held against the testator or his estate, and that the balance was advanced in cash at the time of the sale. Here, then, is no circumstance from which fraud or collusion can be inferred, and consequently there is no excuse or reason to follow the assets. But these authorities are adduced for another purpose, viz: to show that at common law an executor had the power of disposition over the assets of his testator, in any manner he saw proper for the purposes of his trust, and to show, moreover, unless the contrary appears, that when a purchaser advances his money for property of the testator, at the time of the sale, that this is *prima facie* evidence that he did it to enable the executor to carry out his trust. Now, reasoning *a posteriori*, does it not follow, from the effect of these decisions, that the power of sale is necessary to these various acts? Is it not the very cause which leads to such effects? Or, setting out with the proposition, that "the power of sale was incident to the office of executor," and reasoning *a priori*, would not the consequences of all these decisions follow, viz: that where one purchased *bona fide*, without fraud or collusion, and advanced his money when the purchase was made, the sale conferred a good title, and the purchaser could not be deprived of his property. This, we take it, is the law, and if we are right, his Honor's opinion is not supported by the common law, but is in direct opposition to it. But, on the other hand, it must be confessed, that this sale was made under a power, and it is contended that its validity depends upon a^d execution of that power. This we are ready to concede; but we think that that power has been duly executed, and that the testator's i

has been carried out in the sale made to the plaintiffs in error. But it may be asked, if this whole question depends upon the construction and execution of the power, wherefore the necessity of discussing, at such length, the executor's power at common law over his testator's assets, and the consequences resulting from that power? In reply, we have only to say, that the power which the will gives the executor to sell is general; that it does not specify the mode in which the sale is to be made, and that his Honor must either hold that the statutes of the State do specify a mode in which such sales are to be made, and that inasmuch as the testator lays down no rule for his executrix, he must be presumed to have intended, that she should adopt and carry out the rule of the statute in relation to executor's sales; or that where the statute does specify a mode, the testator has no right to confer a power to sell in any other mode.

The court need not be reminded, that we have already *shown* that at common law no mode of sale is specified, and we now deny (and shall attempt to prove it in a subsequent part of this argument) that there is a particular mode of sale, under circumstances like the present, laid down in any statute of the State.

We shall contend, too, that when the power is general, and there is more than one mode of executing it, the donee has his option which he will take. This proposition will be argued first, upon the supposition that the law does not specify a mode of sale, under circumstances like the present; and, secondly, that the law does specify such a mode. If it shall be established that no such mode is specified, the discussion of the second point will be useless; and it then becomes a matter of some consequence, to know what the regulations of the common law are upon the subject. It has been shown that there are none at common law, and his Honor may not hope to find shelter and protection there. We hope, therefore, that the materiality of the discussion is apparent. Before examining the rules which govern in the construction and execution of powers, it may be as well to reply to a point to which allusion has been made, though, in justice to his Honor, it must be said that the point (*viz*: as to the right of the testator to confer a power to sell, in a manner contrary to that which the statute requires) did not enter into his decision, and was not discussed nor insisted upon by him. I have been able to find no case precisely in point, but there are cases strikingly analogous, and which bear directly, and with great force, upon the question. We allude to those cases arising under the statute of frauds.—29 *Char. 2*. This statute directs, that all devises of real estate shall be attested by three witnesses; otherwise they shall be utterly void. Now, there are cases which hold, that power may be conferred upon a person, to convey lands by will, attested by two witnesses; and that a will, conveying lands, and thus attested, would be upheld by the courts as a good execution of the power, notwithstanding the statute.—1 *Sugden on Powers*, 154.

Having disposed of this preliminary question, we are now prepared to discuss the rules which govern in the construction and execution of powers; and here we may safely lay it down as a general rule, which not be controverted nor denied, that naked powers are to be strictly

construed.—2 *Harrison's Digest*, 1734. "The court, also, is to be governed by the intention of parties in the construction of powers.—*Pomroy vs Partington*, 3 *T. R.* 665. And in the execution of powers, the general rule of law is, that it must be according to the substantial intention and purpose of the party creating the power; and the general intention must be carried into effect, though it should defeat a particular interest.—*Jackson vs. Veeder*, 11 *Johns. R.* 171. And this intention, according to *Buller and Ashurst, Js.* in *Griffith vs. Harrison et al.* 4 *T. R.* 749, is to be collected from the words of the will, or other instrument, conferring the power, according to the ordinary and common acceptance of the words, and not according to any legal or technical exposition of them."

Now, let us apply these plain and simple rules to the power in question. The testator directs the notes and accounts, which he had in hand at the time of his death, to be applied by his executors to the payment of his debts; and, in case they should not be sufficient for that purpose, then he directed that a sufficient portion of his estate, real or personal, as his executors should deem advisable, be sold for the payment of his debts. The principal intention here, then, was the payment of debts; and, in order to carry out this intention, money would be necessary, and that money must be raised from one of two sources, or from both. The executors, under this power, in order to carry out this intention of the testator, were compelled, in the first instance, to apply the notes and accounts, in the hands of the testator at his death, to the payment of his debts; and, if these had satisfied his debts, the executors could not have sold the property under the power; and, indeed, they could not have disposed of property, under this power, until it was clearly ascertained that the notes and accounts were insufficient to meet the demands against the estate; but the instant this deficiency was ascertained, then they were as much bound to sell, as they were, in the first instance, to apply the notes and accounts in the manner directed by the testator; and, in this case, it was clearly established that the executrix did not undertake to sell until the contingency had happened, upon which she was not only authorized, but bound to sell. But what more? The testator says, Sell—in a certain event, sell my property; sell what property you please; I leave it all in your hands, and I invest you with full discretion. I do not require you to sell in any particular manner. If a sale becomes necessary for the payment of my debts, I invest you with full, comprehensive, general authority to sell. The power I give you is as unlimited, general and broad as language can make it; and yet, strange to say, his Honor holds that this general power to sell, restricted to no particular mode of sale or conveyance, means a sale at public outcry. Such a conclusion is opposed by every principle of sound construction, and is directly at issue with the elementary and general rules of law upon this subject. "Where a particular instrument" (says Sir Edward Sugden in his *Treatise on Powers*, 260) "is required, as a deed or will, the power cannot be legally exercised in any other manner." * * * * But when power is given generally, without defining the mode in which it must be executed, it may be exercised, either by deed or will, &c. F

stances of the great particularity and strictness required by courts in complying with the particular circumstances which the grantor of the power requires in its execution, see *Sugden on Powers*, 264, *et sequitur*.

The whole doctrine is admirably illustrated and expounded by Lord Mansfield in *Darlington vs. Pullen*, *Cowper R.* 260, where it is held, that a common law power to appoint by deed, executed in the presence of two witnesses, is ill executed by will; otherwise if the power had been to appoint by any writing or instrument or other general term." *Wright et al. vs. Wakeford*, 4 *Taunt. R.* 213, decides that a power to trustees with the consent of the *cestui que trust*, testified by writing under their hands and seals, attested by two or more credible witnesses, to make sale of lands, is not well pursued, if the attestation be only sealed and delivered in the presence of two witnesses; and that an attestation, added after many years, witnessing the signing, sealing and delivering at the time of making the deed, will not supply the defect, by Justices Heath, Lawrence, and Chambre, against Sir James Mansfield, Chief Justice.

We do not pretend that these cases are directly in point; we only say that they are analagous to the present case, and that that is within the rule, which they establish. Now, if Wright had directed his executrix to make a private sale, and she had sold at auction; according to these authorities, that would have been a bad execution of the power, and the sale, being contrary to the power, would have conferred no title; and so, if the direction had been to sell at auction, a private sale would not have executed the power; and if he had directed his property to be advertised fifteen days, and then sold at auction, the sale at auction would not have been a compliance with the power without the fifteen days' advertisement, and would have conferred no title upon the purchaser. But is not the converse of the proposition, which the foregoing examples have been given to illustrate, equally true? and does it not follow, from the foregoing authorities, that when the power is general, as it is in this case, and there are more modes than one of executing it, that it is optional with the donee which he will take? Upon the authority, we may conclude, that the sale in this instance was a valid execution of the power, and conferred a good title. Hitherto we have discussed this question upon the supposition, that the statutes did not lay down a rule for sales made by executors. We shall now discuss it upon the contrary supposition; and we think we shall succeed in showing from the authorities, that his Honor is altogether wrong in assuming, that when the law lays down a rule for the execution of an instrument or the mode for the performance of a particular act, that the donee of a general power must, in the execution of that power, when the instrument conferring it is silent as to the mode in or the instrument by which it is to be executed, follow the rule of law. And here it will be necessary, in the first place, to advert to the rule laid down in *Jackson vs. Veeder*, viz: that the execution of a power must be according to the substantial intention and purpose of the party creating the power. "No particular solemnities are by law required in the execution of powers; it rests in the breast of the person creating the power to impose such ceremonies as he may think proper. A power may be reserved to be executed by a simple note in writing, or by will unat-

tested or attested by only one or two witnesses, and this, although the subject over which it rides is real estate."—1 *Sugden on Powers*, 154.

The donee may be directed to follow the rule of the statute of frauds in the execution of a power; but then this rule must be arbitrarily asserted by the party creating the power (1 *Sugden on Powers*, 155; *Wilkes vs. Holmes*, 9 *Mod. R.* 485); and this requirement may be either expressed or implied—expressed, as where it is said that the power is to be executed by will attested by two witnesses; implied, as where it is said that a power is to be executed by will, or by will duly attested, or legally or duly and legally attested.—1 *Sugden on Powers*, 297. Accordingly, in *Poulson vs. Wellington*, 2 *Peere Williams*, 533, when the power was to be executed by any writing duly attested, and it was executed by deed, attested by one witness, the Lord Chancellor held it to be a valid execution of the power, because the law required the attestation of but a single witness.

But, *quere*, If it had been a power to appoint by any writing simply, and the words duly attested had not been added, would the chancellor have held that any witness was necessary to a valid execution of a power?

This question will be fully answered in the sequel.

In *Saunders vs. Franks*, 2 *Madd. R.* 418, the power was to dispose of a lease-hold estate by will, "duly executed and attested." The will of the donee of the power was neither signed, sealed, nor attested: held, that it was not a good execution of the power. The court will here notice that this was a power to be executed in a specified mode, to wit, by will, and that that will was to be duly executed and attested. Another case cited by Sir Ed. Sugden, is that of *Willan vs. Lancaster*, 3 *Russel*, 108. I have been unable to procure the book, and must therefore give the case as it is stated in the text of the *Treatise on Powers*, 295. This was a case where customary lands were vested in a trustee for such persons as the owner by any deed or instrument in writing, or by his last will and testament in writing, or by any codicil, or any other instrument purporting to be in the nature of such last will, &c., to be by him legally executed, should appoint: it was held that a codicil, not attested, was not a due execution of the power. In this case, the court will observe that the instrument by which the power is to be executed is required to be duly executed; but there was to the execution of this power by any other than a legal instrument, a most valid and controlling objection, which does not seem to have been noticed. The power was reserved to the grantor to make the appointment, and he could not have reserved the power to make such an appointment by any other than a legal instrument, executed with all the formalities which the law requires.—1 *Sugden on Powers*, 156; *Habergham vs. Vincent*, 2 *Vesey, Jr.* 204.

These are all the cases, enumerated by Sir Ed. Sugden, bearing upon the point we have been discussing; to them I shall take the liberty of adding that of *Wilkes vs. Holmes*, *Mod. R.* 485, where Lord Hardwick decided, "that a will executed by two witnesses was not a valid execution of a power to charge lands by will required in general terms to be duly executed." The decision in *Jones vs. Clough*, 2 *Vesey, Jr.* 1 was correct, as falling within the principle of *Habergham vs.*

There the power to appoint was reserved to the grantor, and of course he could not reserve the power to appoint by any other than an instrument executed with all the due formalities of law.

Now, these cases do not seem to warrant a conclusion which Sir Edward Sugden (*Powers*, 297) has drawn from them, viz: that where the power is to be executed by will, such a will as the statute of frauds requires will be intended by the court. Upon observing the foregoing cases, it will be perceived that in every single instance, where an instrument has been set aside for want of legal formality, the deed, will or other instrument creating the power, required it to be carried out by an instrument duly or legally executed, duly or legally attested. In fact, in all these cases great stress is laid upon these words, and they seem to be the turning point in the cases. Now, we are aware, that there are *dicta* to be found, which do sustain Sir Edward Sugden's view of this question, but they are mere *dicta*; there is no reported case, where the point has come directly before the court and been decided; and, indeed, these *dicta* seem to be loose, and to violate every sound principle of construction.—See note 7 by Mr. Jarman, 1 vol. *Powell on Devises*, 66.

But we may concede all that Sir Edward Sugden claims from these decisions, and still we contend that his Honor's construction of the power derives no authority or support from them; the circumstances of these cases, and the one now under consideration, are essentially different in principle; in the foregoing cases, the power, in every instance, was limited, either by specifying the instrument by which it was to be executed, or where it was conferred to be executed by any writing, by requiring that writing to be duly executed, &c. Now, this is a general power to sell; it does not say that the sale shall be made in any particular manner, nor does it say that it shall be duly made, or legally made. Now, here is a real distinction between the cases in the books and the one before the court, and from this distinction important results follow. One would suppose, from these cases, that where the power given to be exercised, without specifying the mode in which it was to be exercised, no great legal formality would be required in the execution of the instrument, carrying it into effect, inasmuch as the intention of the party in creating the power, is to govern in its execution, and inasmuch as the instrument, carrying out the power, is only required to conform to the formalities of the law, either where the party has so expressed himself, or where he has used general expressions, or terms from which such an intention is necessarily implied. But, fortunately, this conclusion does not rest wholly upon inference, although that inference is strong, and, unquestionably, it has the sanction of some great names to support it. "But it may be observed that, if a will or writing, purporting to be a will, is required to be the instrument by which the power is to be exercised, without saying more, a will, to be a valid exercise of the power, must be executed as a proper will, under the statute (of frauds); but that where the instrument creating the power is silent as to the instrument by which it is to be exercised, it may, as it seems, be executed by a will not complying with the statute of frauds."—1 *Sugden on Powers*, 157; *Thwaytes vs*

Dye, 2 *Vernon*, 80, *note*. Upon all the foregoing questions, see (*note B*) 11 *Coke*, top page, 474.

This question has been discussed upon the supposition that the statute of the State prescribed certain formalities to be observed in executors' sales, and we have endeavored to show that the testator had a right to confer a power upon his representative to make a sale in a different mode from that required, and that he had exercised that right, and conferred such a power, by giving his executors a power to sell, without specifying the mode in which the sale should be made, and without using general expressions in his will, from which it could be inferred, that he intended that his executors should adopt and follow the rule of the statute, in the sale to be made, under the power given by the will.

But we contend that there is no statute of the State requiring executors (where the testator empowers them to sell) to make their sales at public auction; and before examining the various statutes upon the subject, we will only premise, that his Honor decided, and we think rightly, that where the will conferred authority, such authority dispensed with an order from the Court of Ordinary to authorize the sale; that authority in the will stood in the place of such an order, &c.

Now, in the opinion delivered below, and in the argument of counsel, great stress was laid upon the 4th section of the act of 1764, (*Prince*, 223,) which is in these words: "All intended sales of goods and chattels belonging to testators and intestates, shall be published in two or more public places in the parish (county) where such effects are to be sold, and in the gazette, at least forty days before such intended sale."

Upon this act, it was contended that every sale made by an executor, or administrator of personal goods or chattels, must be advertised for forty days, as herein directed, and that the terms goods and chattels, included slaves; that those terms, when taken in their most extensive signification, generally speaking, do include slaves will not be denied; but that they do include slaves, as used in this statute, is denied. By the construction which has been uniformly placed upon this act, in practice, those terms are held to embrace only such effects as are commonly denominated perishable property, in contradistinction to slaves: such, for instance, as hogs, horses, sheep, cattle, household and kitchen furniture, farming utensils, &c. There is nothing in this act, or any other that I know of, that requires an order of the court to sell such effects, and in practice, at least, they are usually sold after forty days' notice, not at the usual place of holding sales in the county where they are sold, but at the residence of the testator or intestate. But can slaves be disposed of in a manner so summary, where a sale is ordered by the court? Let us see if we have no act relating to the sale of slaves? The act of the twenty-first of December, 1829, (*Prince*, 354,) is an act to authorize "the inferior courts of this State, when sitting for ordinary purposes, to order the sale of any slave or slaves belonging to the estates of testators or intestates or wards." We shall presently see how the provisions of this act, which seem to have some slight bearing upon the subject under discussion, coincide with the act of 1764. The enacting clause is as follows: "It shall and may be lawful for the inferior courts of the several counties in this State, when sitting for ordinary purposes, to order sale of any slave or slaves, belonging to the estate of any testator

testate or ward, on the application of the executor or executors, administrator, administrators, or administratrix, guardian or guardians, which shall be at public auction, and on the first Tuesday in the month, between the usual hours of sale, at the place of public sales in the county where the letters testamentary of administration or guardianship may have been granted, giving sixty days' notice thereof in one of the gazettes of this State, and at the door of the court-house of the county where such sales are to be held, when it is made fully and plainly to appear that the same will be for the benefit of the heirs and creditors of such estate, or of the ward of such guardian or guardians; provided, that a notice of such application for leave to sell, be first made known in one of the public gazettes of this State, at least four months before any order absolute shall be made thereupon."

Well, this act is passed to regulate the sale of slaves, and if there is any point of resemblance between its provisions and those of the act of 1764, it has escaped our observation. This act requires a sale of slaves to be advertised sixty days in the gazette, at the court-house door of the county where letters are granted; but if slaves are goods and chattels within the meaning of the act of 1764, they may be sold after being advertised forty days in the gazette, and at two of the most public places in the county where they are sold. This act requires them to be sold at public auction, and at the usual place of public sale in the county. The act of 1764 does not require sales of goods and chattels to be so made. From these and other points of difference in the two acts, we conclude that they relate to wholly different subjects; and as the act of 1829 does profess to authorize the sale of slaves, and to point out the manner in which they shall be sold—and as neither the terms nor spirit of the act of 1764 embrace or allude to sales of slaves—we conclude, without doing any great violence to the known and ascertained rules of construction, that the latter act has nothing to do with the sales of slaves by executors or administrators. And if the act of 1764 even did embrace slaves in the general terms, goods and chattels, they have been taken from the operation of those terms by the act of 1829, which repeals the act of 1764, so far as it relates to slaves.

The question here to be considered, then, arises upon the act of 1829, and not upon the act of 1764. We have seen, that at common law an executor is, in many respects, and for many purposes, to be considered by third persons as the absolute owner of the personal estate of his testator; that the power of disposition is incident to his office; that he has a right to sell, pledge, assign or mortgage the assets of his testator, for the purposes of his trust, and that a purchaser, &c., *bona fide*, who advanced his money at the time of such sale, pledge, or assignment, acquired a good title to the assets so sold, pledged, or assigned; that he was not bound to see to the application of the purchase-money; and that unless fraud or collusion with the executor was shown, a residuary or specific legatee, or co-creditor, or co-executor, could not follow the assets into his hands. Now, how does the act affect these provisions of the common law? Does it repeal them *in toto*, or in part only? Does it only curtail these powers, or does it destroy them altogether? We answer, that it does most undoubtedly repeal the general power of disposition incident to the office; that it takes from the executor the power which

he had of disposing of specific legacies ; that, in all cases where the will does not direct a sale, or confer such power upon the executor, he must, under this act, apply to the court for its order and direction. When a necessity is shown to the court for the sale of a specific legacy, the court must order the sale, in order to confer a valid title upon the purchaser, unless the will directs a sale. It also takes away the power of pledging, mortgaging, or assigning the assets, unless the will so directs, either in express terms, or by the use of such general terms as will warrant the conclusion that such was the testator's intention.

But does it follow from these alterations in the common law, that a statute passed to limit the large powers of executors takes away from testators the right of conferring upon their executors the same powers, which the statute confers upon the court where the will is silent upon that subject ? Does the statute deprive them of the right of conferring upon their representatives, when they see proper to do so, the large and ample powers they had at common law ? Upon the principles we have heretofore been discussing, it does not : nay, more, the very oath which an executor is obliged to take upon entering on his duties, makes the will his law, and compels him to look to it for his direction, and not to the court, nor to the statutes. This shows that he derives his authority from that instrument, and not from the court ; and we respectfully contend, that it is only in cases where the will has failed to confer sufficient authority upon him to enable him to carry out his trust, and administer the estate, that he is bound to ask directions from the court, and that the court has a right to interfere. But what is the fact in this case ? Is the power of sale left in the hands of the court by this will, or is it taken from the court, and placed in the hands of the executor ? The third item of the will gives this power to the executor, and it confers it in general and unlimited terms, as we have seen ; there is nothing in it requiring the formalities and requisites of the act of 1829 to be observed, in the sales it orders ; the case does not therefore fall within the provisions of the statute, and the terms of the act only require such sales as the court has a right to order and does order, to be advertised and made at public auction : this we think is altogether clear from the words of the statute. Let us see what those words are : " It shall, and may be lawful for the inferior courts of this State, &c., to order the sale of any slave or slaves, belonging to the estate of any testator, &c., upon the application of the executor, &c., *which* shall be at public auction," &c.

What shall be at public auction ? Why, the sale. But what sale ? The sale which the testator orders, or that which the court orders ? Now, to what does the pronoun, *which*, refer in the above statute ? Most undoubtedly to the sale mentioned in the preceding part of the act. And what sale is that ? Why, the sale ordered by the court ; there is no other mentioned, alluded to, or embraced, in the terms or spirit of the statute. But what did the testator intend by conferring upon his executrix authority to sell ? Did he mean that the court should exercise the power concurrently with her ? If so, where was the necessity for such direction in the will, since the court would have exercised the power, if the will had been silent upon the subject ? Or, why did he not vest the authority in terms of the statute, if he intended that his representative should make that her rule, or use such general terms as would have

ranted the inference, that he intended that the provisions of the statute should be carried out in the sales he ordered his executors to make? We say that he must be presumed to have known the law, in the act of executing his will, and that the third item of that will has a meaning and signification to our minds very different from that which is conveyed to his Honor's. We think that he meant to divest the Court of Ordinary of all the jurisdiction it would have had over the sale of his property if he had given no direction upon the subject. The authority he conferred was general, and it was ample for every purpose.

Now, suppose that the law, conferring this power upon the court, had not restricted its exercise, by designating the mode in which it was to be exercised—had merely given the court power in general terms to order the sales of the property of deceased persons? Would it be contended, for one single moment, that the court could not order the sale in any manner that it might deem best? We think not. Then why, when such enlarged power is conferred by the will upon the executor, is it contended that he must be restricted to a particular mode in its exercise? There is no difference between the cases. In the one instance, the statute is his law, and in the other the will: the authority of the statute is not one whit more binding than that of the will. If the sale had been at public outcry, the gentlemen might have contended, with just as much propriety, that under the power in the will, it should have been private, in order to confer a good title upon the purchaser. Here is a general power to sell, and these general terms include both private and public sales. Now, having shown that this case is taken from the operation of the statute by the clause in the will, we might have closed this argument, but for the fact that his Honor's decision makes one other very important concession to the rights of the plaintiffs in error.

His Honor admits that the will dispenses with an order from the court; that it is the executor's authority to sell; that this authority stands in the place of the order; and we maintain, that where the authority to sell is clear, the purchaser is not affected by any irregularity in the sale, and such irregularity cannot be collaterally inquired into in a suit with a stranger.—*Perkins vs. Fairfield*, 11 *Mass. R.* 227; *Thompson vs. Tomlin*, 2 *Peters, S. C. R.* 157. And now this argument is closed; and in closing it, we can but lament that his Honor's decision is inconsistent in its parts. From a view of all the points, we think that his Honor erred in ruling out the bill of sale.

By the Court—NISBET, Judge.

The facts in this case are as follows: James H. Wright departed this life, testate, leaving his wife, Elizabeth Wright, and two other persons, his executors; Mrs. Wright alone qualified. The testator in his will directed that his notes and accounts be applied to the payment of his debts, and should they prove insufficient, he declares it to be his will and desire, "that a sufficient portion of my estate, real or personal, as my executors shall deem most advisable, be sold to pay my debts." The notes and accounts proving insufficient to pay the debts of the testator, she sold a parcel of the negroes at *private sale* to Bond and Murdock, to pay his debts.

Bond & Murdock et al. vs. Zeigler et al.

According to the testimony, Bond and Murdock were creditors of the estate, to half the amount of the purchase-money, which was allowed them; the other moiety they paid in cash. The executrix executed to them her bill of sale for the negroes. It is not shown, by the record, that the sale was on any account fraudulent; no collusion or covin is established. William Zeigler, the defendant in error, being also a creditor of the estate of James H. Wright, deceased, having reduced his claim to judgment against the executrix, caused a levy to be made upon the negroes so sold, as aforesaid, in the hands of Bond and Murdock, the purchasers, as the property of the estate. Bond and Murdock interposed a claim. Upon the trial of the claim, it was conceded that the estate was largely in debt, and that the notes and accounts were wholly insufficient to pay the debts. In support of their title, the claimants tendered the bill of sale of the executrix for the negroes sold to them, and now in controversy, to which the counsel for plaintiffs in execution excepted, upon the ground that it appeared, upon the testimony, that the sale of said property had been made by the executrix privately, and without the statutory notice. The exception thus taken was sustained by the court, and the bill of sale repelled, on the ground that the executrix had no authority to sell at private sale, and that no title could vest in a purchaser, except after advertisement and upon public sale. To this judgment of the court below, the plaintiffs in error except, alleging that it is contrary to law; that the executrix had authority, under the will, to sell at public or private sale; and that, therefore, the title of the purchasers is good.

It was not exactly regular to attack this title thus collaterally; it was competent for the creditors, in a different form of proceeding, to have made a direct issue upon its validity. But waiving this point, we adjust ourselves to the consideration of the questions made in the assignment. They are of great practical importance in this community; questions upon which executors and guardians, very generally, no doubt, are willing to receive the instructions of this court. The main question made in this case, is this: do the purchasers acquire a good title to the property, as against the creditors of James H. Wright, deceased? This question depends altogether upon the previous question, viz: had the executrix the power, under the will of her testator, and by the laws of Georgia, to sell, as she did sell, at private sale?

It is proper to remark, that the learned counsel for the defendants in error, admitted in argument the power and right of the executrix to sell, contending, however, that she could not sell at private sale, but must sell at public sale, and in the manner pointed out by the acts of our own Legislature. This admission narrows somewhat the inquiry; yet, to a fair elucidation of the points in controversy, we find it necessary, briefly and rapidly, to review the common law doctrine, as to the power of an executor over the estate of his testator, and as to the rights of purchasers setting up title under an executor. In England, it is a general rule, that an executor has an absolute power of disposal over the whole personal estate of the testator. The realty descends there to the heir; and as real and personal estates are by statute upon the same footing here, we might say that this power extends in Georgia to lands.

Another general rule of the common law is, that the effects cannot be followed in the hands of purchasers by creditors or legatees; nor

they required, before buying, to look into the accounts of the executor, to ascertain that he is faithfully administering his trust; the law presumes this, in his favor. Nor are purchasers required to see to the proper application of the purchase-money: in the language of Lord Thurlow, in *Scott vs. Tyler*, "What becomes of the price, is no concern to them." These are general rules of the common law, and are founded in the most obvious expediency; indeed, in the most manifest justice to the trustee, his *cestui que trust* and the alienee. Without such a power of disposition, an executor could not execute the trust devolved upon him, and therefore no one would be found to fill fiduciary situations. The departed would in vain have left wills, for nobody would execute them. Without such immunity to purchasers, no one would deal with an executor.—*Williams' Exrs.* 671–675, sec. Am. ed.; 4 *Term. R.* 625; 1 *Atk.* 463; 1 *Cox R.* 145; 2 *Dick. R.* 725; 2 *Story's Eq. sec.* 1128–1130; 7 *Johns. Ch. R.* 150; 3 *Atk.* 235; 2 *Vesey R.* 269; 2 *Vesey R.* 466.

These are general rules, and are not without exceptions. Exceptions to the general power of an executor to dispose of the estate of his testator, will be found in those cases only where *collusion* exists between the representative and the purchaser. That an executor may waste the trust estate, is not sufficient to invalidate the sale; it must further appear that the purchaser participated in the *devastavit*. Fraud and covin will vitiate any transaction; and if the purchaser *concerts* with an executor, by obtaining the testator's effects at a nominal value, or at a fraudulent undervalue, or by applying the value to the purchase of other effects for the behoof of the executor; or if he knows, that, from the face of the transaction, the executor is applying the assets to the payment of his own debts; in all such cases, and all others falling within the reason of these, not only will the executor be liable over for a *devastavit*, but the purchaser buys at his peril—gets no title, and holds the property encumbered with the trust.—See the whole doctrine reviewed by Chancellor Kent in *Field vs. Schieffelin*, 7 *Johns. Ch. R.* 150. It is, as I have already stated, not necessary, in general, that the purchaser should look to the application of the purchase-money; where, however, a trust is created for the payment of specific *debts*, or for a special object, the purchaser is bound to look to the application of the purchase-money.—*Story's Eq. sec.* 1127–1130; 3 *Mason*, 218.

Now, as in this case there was no fraud, or collusion, or covin, between the executrix and the purchasers, according to these general common law principles, they acquired a good title.

The power to sell is an incident to the office of an executor, without directions to that effect in the will; if the will authorizes or directs a sale, *a fortiori*, he is empowered to sell: indeed, he has no discretion; he is bound to sell. The will is the law of the trust, and the measure of his obligations. He may not depart from its requirements, unless, indeed, they be in violation of the laws of the State. Whatever title the testator himself has to his effects, his executor under a power in the will may convey. These are principles so familiar, that I deem it useless to cite authorities to them. By the will of Mr. Wright, his executors are expressly authorized to sell his real or personal estate, "as they may deem most expedient," to pay his debts, upon the contingency that his notes and debts would not be sufficient to pay them; that contingency occurred,

and in pursuance of the will, a number of the negroes were sold. Now, unless that sale was void for some cause growing out of the statute laws of Georgia, the purchasers, beyond all controversy, acquired to them the same title which the testator had, and a title, too, good against his own creditors. The conclusion of the law is, that the executor will apply the proceeds of the sale, *bona fide*, to the extinguishment of the debts, and there is no equity in the creditor's receiving the price, and then also appropriating the property. The purchasers were themselves creditors, to the extent of one-half the purchase-money; the extinguishment of their debts was a valuable consideration. They had as much right to be paid as other creditors, and stand before this court upon the same footing to the extent of their claims against the estate with the plaintiffs in execution. As to the other moiety of the purchase-money, they having paid that in cash, occupy the ground of *bona fide* purchasers. It is not a sufficient answer to all this, to say, as was said by counsel for the defendants in error, that the estate was wasted; that these purchasers were favored as creditors contrary to law; that the estate was insolvent, and the debts ought to have been paid according to the grade established by statute. It is no answer to say, that the recognition of this sale is a practical abolition of the law, which designates the order in which the debts of an insolvent estate are to be paid. The reply to reasoning of this kind, is this: If the executrix has mismanaged the estate, she is liable personally for the *devastavit*. Farther, if the creditors were apprehensive that the estate would prove insolvent, and knew that the executrix was mismanaging it, equity stood ready to furnish them with a process to compel her to administer the trust according to law. If it is still urged, as it was urged, that this is a hard case, then we reply, the general rules of the law cannot give way to the imaginary or real hardships of particular cases; the safety of all rights depends upon the unrelenting universality of the laws which protect them.

But, conceding the power and the obligation in this case to sell, it is contended, that, inasmuch as the will is silent as to the manner of the sale, it was the duty of the executrix to have sold in the manner pointed out by the laws of Georgia, regulating the sale of slaves by executors; not having sold according to this manner, the sale is therefore void. It is, to be more definite, contended, that the executrix should first have applied to the Court of Ordinary, and obtained an order for the sale of these negroes; that the sale should have been at public auction, on the first Tuesday in the month, at the place of public sales, in the county where the letters testamentary were granted; having given sixty days' notice thereof in one of the gazettes of this State, and at the door of the courthouse, in the county where the sale was intended to be held. These are substantially the requirements of the act of 21st December, 1829.—*Prince*, 254. The defendants in error also rest their case upon the act of February 29th, 1764, which requires "all intended sales of goods and chattels belonging to testators or intestates, to be published in two or more public places in the parish where such effects are to be sold, and in the gazette at least forty days before the day of such intended sale.—*Prince*, 223.

We are of opinion that the act of 1764, for reasons which we presently give, has no relevancy to this case; and the first r

make upon the act of 1829 is this: it was intended to apply only to cases where the will gave no instructions whatever as to the sale of property. The Court of Ordinary is authorized to grant an order for sale, upon the application of the executor. What need, it may be asked, of such an application, if the testator has himself directed a sale? Would the order in such a case be any greater protection to the executor than the will itself? Certainly not; it would be an act wholly supererogatory. Suppose that the will directs a sale for a certain purpose, and in a certain way, and the Ordinary, upon the application of the executor, should order a sale for a different object, and in a different manner; would that order be a protection to the executor? Unquestionably not. If the will speaks at all, its language is both a protection and a mandate to him. The power of the Ordinary can in *no case* relieve the executor from his liability as trustee, or shelter him from the consequences of a *devastavit*. The most that can be said of these orders of the Ordinary is, that they are wisely precautionary—designed to protect the interests of orphans, legatees and distributees, and are only *prima facie* evidence of a faithful administration of their trusts in favor of executors, administrators and guardians. He who believes that an order of the ordinary will protect him from liability as a trustee, will do well to wake up at once from so flattering and false a delusion. The will of a testator, although a complete protection for any act which it legally authorizes, is not itself by any means a protection against unfaithfulness or negligence in the manner of doing it.—But, to return: What necessity is there, we inquire again, under these views of the subject, for an order to sell negroes, when the will directs a sale? Our conclusion is, that the act referred to never was intended to operate in any such case.

The Legislature never intended to interfere with the right of the citizen to direct the manner in which his estate should be administered; a right as sacred and as necessary as the right of testamentary disposition itself. They only intended to authorize a sale, in cases where the will, making a general disposition of the estate, is silent as to sales. Cases do often occur, where such sales would benefit the heirs and creditors, without interfering with the dispositions of the testator. These comments on the act of 1829 are made to introduce the following remarks, to wit: in our opinion, the will of Mr. Wright does not alone direct the sale of his negroes, but, by necessary *legal* construction, also directs the manner of the sale; and if it does, then the provisions of the act of 1829 do not apply to it. There are two ways of selling; two modes, *public and private*. We say nothing of *degrees* of publicity and privacy. Legally, and in the view of common sense, these are the modes of effecting a sale. Now, because the testator did not specify the one or the other, he meant to leave it to the discretion of his executors, to adopt the one or the other, according as they might believe the one or the other would best promote the interests of his estate. And when the executor has elected, that is the mode which the testator meant. In other words, the discretion placed in the hands of the executor is part of the meaning and intent of the will, and it is not competent to strain the construction of a statute, to control the intent of the testator. Such a construction of this will is *sus-*
by authority, and is in accordance with reason. In cases where a conferred, and the manner of executing it is not prescribed, and

there are more ways than one of enacting it, the appointee is left to his discretion as to the manner.—4 *Kent's Com.* 331; *Sugden on Powers*, 201.

There are good reasons for such a rule of construction. The testator is presumed to have left the mode of the sale undetermined, because he could not foresee whether, in the event it should become necessary to sell his lands or negroes to pay his debts, it would be more to the interest of the estate to sell at public or private sale. In some conditions of the estate, and in some states of the market, a private sale might be most judicious; at others, a public sale. It might not be the interest of the estate to sell the negroes in one, and only one, county, as the statute directs. It might be to the interest of the estate, with a view to a better price, to take the negroes out of the State to a better market. Considerations of this kind might, and in this case, doubtless, did, enter into the mind of the testator, and, therefore, all these things are left to the discretion of his chosen fiduciary agent. It is a personal trust, both the sale and the discretion as to the manner, with which the Court of Ordinary has no right to interfere. Again: if the testator intended his executors to be subject to the ordinary, under the act of 1829, why make *any provision at all*, as to the sale of his negroes? The power to sell would have existed without any authority under the will. The discretion, therefore, as to the manner, we think, was intentionally devolved, in this case, upon the executors, and the will having thus regulated the manner of the sale, this is not one of the cases contemplated by the act of 1829.

This act, moreover, does not declare that no sale of negroes by an executor shall be made, unless according to its provisions; it is not inhibitory. It makes it lawful for the Court of Ordinary, on the *application of the executor*, to grant an order for sale, if it is made plainly and fully to appear, that the same will be for the benefit of the heirs and creditors. Upon such application *being made*, the court may, or may not, take, with the executor, the responsibility of a sale, and extend to him the benefit, legal and moral, of the *prima facie* protection which its order will afford. If, upon the application being made, the court grants the order, then the statute prescribes the place and manner of the sale. If no application be made, then the executor is left to the rights and responsibilities which appertain to him under the general laws of the land; to these he is amenable, under all circumstances and at all events, for the proper execution of his trust. Do we, then, by this construction, make void the act of 1829? By no means. Its precautionary protection to the rights of minors, legatees and creditors, in all cases to which it applies, as well as its *prima facie* protection to executors, administrators and guardians, continues. The act of 1764, we think, applies alone to the perishable property of the decedent. "Goods and chattels" do not here mean slaves. If they did, this act, so far as slaves are concerned, is repealed by the act of 1829; for that relates to slaves, exclusively, and some of its provisions are in conflict with the act of 1764. It was also claimed, in argument, that the act of 1805 applied to this case. We think not: for its provisions embrace administrators only, and cannot, therefore, be extended to executors. Upon the best consideration we have been able to give to this subject, we are constrained to believe that the court below erred in its judgment, in the questions submitted to us, and, therefore, we reverse it.

No. 56.—HAMMUTUAL JOHNSON, plaintiff in error, vs. ARTHUR H. WATSON, defendant in error.

A parol contract for the sale of goods, to be delivered, and which the parties reasonably expected would be delivered, within a year, though the price was to be paid after that period, is not within the statute of frauds; because, in such case, all that is on one side to be performed, namely, the delivery of the goods, is to be done within the year.

If there has been a delivery, either actual or virtual, by the vendor, in pursuance of a verbal sale, he has lost the power of retraction, under cover of the statute, if the vendee chooses to treat the contract as complete.

The statute of frauds has no application to a contract which has been fully performed on both sides.

The question of delivery by the vendor, and acceptance by the vendee, is always a question of fact, exclusively for the jury.

For the facts of the case, and the error assigned, see the opinion of the Supreme Court, delivered by his Honor Judge LUMPKIN.

Judge WARNER, having been of counsel for the plaintiff in error, in the court below, delivered no opinion in this case.

OBADIAH WARNER, for the plaintiff in error.

The first ground of error assigned is, that the court below committed error in not awarding a nonsuit in the cause, upon motion of counsel for plaintiff in error, made after the plaintiff in the court below had closed his testimony. From the evidence of the plaintiff in the court below, upon which he relied for title to the property in dispute, he had no right to recover.

His right to the property depended entirely upon the contract between the parties; that contract was void under the 4th and 17th sections of the statute of frauds.—*Hotch. Dig.* 436.

1st. If the consideration of the contract was, that the plaintiff below should go to Macon, and bring to defendant her negroes, which were there, and to Columbus, and procure her runaway negro, and to attend to the business of Mrs. Johnson for a while, as testified to on the part of witness, Walton, as being the consideration of the contract of sale, then the contract was void under the 17th section of the statute of frauds—the goods (the negro) being of the value of more than ten pounds, there being no earnest money paid, no acceptance of the goods by Watson, or delivery of the negro to him, nor any memorandum in writing of the contract.—*See Bennet vs. Hull*, 10 *John. Rep.* 364; 5 *Wend.* 129; *Howe vs. Palmer*, 5 *Eng. Com. L. Rep.* 303; *ibid.* 419.

It seems to have been admitted by the court below, that there was no earnest money paid, and no delivery of the property, when the contract was made, so as to take it out of the statute.

2d. If the right of Watson to recover the property depended upon that portion of the contract, by which he was to attend to the business of Mrs. Johnson for two years, and then to have the negro, he must fail, because that portion of the contract was void under the 4th section of the statute of frauds, being a contract not to be performed in one year. The agreement was made in the first part of the year 1840. Watson was to attend to the business of Mrs. Johnson for two years, the negro in dispute. Watson, by the terms of the contract, could not have redeemed it within the year.

It is admitted, that if the contract may be performed within the year, it is not

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within the statute. But in the present case, by the express terms of the contract, it could not be performed until after the expiration of two years.

As to contracts not to be performed in one year, see *Shute vs. Dorr*, 5 *Wend.* 204; *Lower vs. Winters*, 7 *Cowen*, 263; *Fenton vs. Emblers*, 3 *Burr.* 1278; *Burch vs. the Earl of Liverpool*, 17 *Eng. Com. L. Rep.* 404.

The contract between the parties, it is true, was an executory contract.—2 *Kent Com.* 449-450. The services were to be performed by Watson. The statute applies as well to executory contracts as to contracts executed.—*Bennett vs. Hull*, 10 *John.* 364.

3d. But the contract was an entire contract, based upon the two foregoing considerations. Being an entire contract upon two considerations, if one was good in law, and the other void under the statute of frauds, the whole contract is void.

Admitting there had been earnest money paid, or a delivery of the property, at the time the contract was made, so as to have supported a part of the consideration in law, yet another part of the consideration of the same contract being obnoxious to the statute, the whole is void. Upon this point, see *Van Alstine vs. Wimple*, 5 *Cowen*, 162; *Crawford vs. Morell*, 8 *John.* 253; *Chater vs. Beckett*, 7 *Term Rep.* 201.

4th. The contract, then, was wholly void under which Watson claimed title, and therefore no property passed to him by virtue of it.—2 *Greenleaf, Ev.* 197.

If the contract was void, then no subsequent ratification or recognition of it, on the part of Mrs. Johnson, could make it void.

The original contract not being binding upon her, it could not form the basis of a new promise or ratification on her part.—*Smith vs. Ware*, 13 *John.* 257; 1 *Atk.* 354; 8 *Cowen*, 361.

The contract of an infant, originally void, cannot be ratified after he comes of age, though a contract merely voidable may be ratified.—2 *Kent. Com.* 334-335; 2 *Swift's Dig.* 82; 1 *Story Com. on Eq.* 303-338.

The doctrine of part performance does not apply, because that doctrine is not applicable to this branch of the statute, and relates only to contracts respecting real property.—1 *Swift's Dig.* 263. C. Justice Kent, in *Jackson vs. Pierce*, (2 *John. Rep.* 223,) said "that a court of law has never decided that a part performance will take a parol contract in relation to land out of the statute."

5th. A writ of error lies for not awarding a nonsuit, when the plaintiff's evidence fails to support his case.—*Foot vs. Sabin*, 19 *John.* 154; *Pratt vs. Hull*, 13 *John.* 334; *Turnbull vs. Rivers*, 3 *McCord*, 131; *Parnell vs. Wilson, Dudley's Law and Equity Reports*, 371. The true test of the propriety of a nonsuit is, that if the case had gone to the jury on the evidence, and a verdict had been found for the plaintiff, the court would have set aside the verdict.—*Graham on N. T.* 280; 8 *Mass. Rep.* 336.

The court below then committed error in not awarding the nonsuit moved for.

The second ground of error assigned is, that the court below refused to charge the jury as requested by the counsel for the plaintiff in error.

The charge requested was a proper and correct one upon the facts. It is true, that the court does say in its charge, "that if the plaintiff, Watson, was prosecuting his claim under the contract, that claim would be obnoxious to the statute of frauds. The court, instead of responding directly to the request of counsel to give the charge we deemed ourselves entitled to, under the law, goes farther, and instructs the jury, "that the principles contended for by defendant's counsel may not apply to the case." It is true, also, that the court says in its charge, that the principles contended for by defendant's counsel are founded in rules of law, recognized by the court, when a case arises for their application. The inference properly drawn by the jury, in relation to this part of the charge, undoubtedly was, that they, in making up their verdict, were not necessarily to be governed by these principles of law, because not necessarily applicable to the case. The charge requested made these principles of law applicable, and the court was asked to apply them to the case. Now, if these principles embraced in the charge requested, were applicable to the case then he

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court, there was error in not giving them their proper and full application to the facts when requested by counsel. We think that it has already been shown, that they were not only *applicable*, but that the title of Watson wholly depended upon them.

The principles of law requested to be charged, made the contract void at all events, and entirely defeated Watson's right to recover. The charge given made it void, or not void, upon a contingency, which the jury might believe had or had not happened, to wit, the subsequent act of Mrs. Johnson, and depending upon their opinion, as to the existence of these subsequent acts.

The court below says, in its charge, "that there is some evidence establishing the recognition of the title in the plaintiff to the property, and that after the contract, which the plaintiff shows as evidence of his title after her hire was out, she was seen in the possession of the plaintiff."

Now, this possession was one of the subsequent acts of recognition, referred to in the charge, which must have conveyed to the mind of the jury the idea that the contract was not void, if subsequently recognized or ratified by the acts of Mrs. Johnson. The inference the jury might properly draw from the charge was, that though the contract *might be void*, yet it was capable of ratification subsequently, and was made binding upon Mrs. Johnson by her subsequent acts. As to the duty of the court to charge the jury, as requested by counsel, see 4th Ala. Rep. (N. S.) 116; 5 Stewart and Porter, 330; 2 Com. Rep. 590.

The exchange of negroes was made *before* the two years expired. The exchange of itself could not amount to a sale, for Mrs. Johnson was receiving Jerusha "for a while," to whom she had never parted title; and her statement, that it was only "for a while," (meaning thereby that Watson should again have possession of her,) was not such an act as would by itself divest Mrs. Johnson of her title.

The original contract being void, the parties stood in the same condition, so far as any right accruing under it, was concerned to either, as if it had never been made. Mrs. Johnson was under no legal obligation to send the negro back to Watson. The title was in her before the exchange, and that could not amount to an absolute sale, for there was no consideration for her promisee, (if her statement amounts to one,) to send Jerusha back to Watson "after a while." It could not operate as a gift, for a gift must be expressly proven to be such, and a delivery under and by virtue of the gift. Nothing was proven, going to show that a gift was intended by either party.

As to the third ground of error—

The contract, if it had been valid, conferred *no title* on Watson. It was only a contract to sell, and not a sale itself. There is a distinction between a contract to sell, and an absolute sale.—13 Mass. Rep. 87. The remedy of the defendant in error, if he had any, (supposing the contract valid,) was by an action for a breach of the contract.

W. D. ALEXANDER, for the defendant in error,

Referred to Cooper vs. Elston, 7 Term Rep. 14; Gadsden vs. Lance, 1 McMullan's Eq. Rep. 87; 2 Bailey 615; 5 Cowen's Rep. 445; 2 Kent's Com. 395-6; 1 Cowen's Treatise, 51; 11 Johns. Rep. 284; 1 East, 193; Hilliard on Sales, 9 and 75; 13 Johns. Rep. 294.

By the Court—LUMPKIN, Judge.

This was an action of trover, brought by Arthur H. Watson against Hammutual Johnson, in Merriwether Superior Court, for the recovery of a female slave, by the name of Jerusha, and tried before Judge Hill at the February Term, 1846. It appeared from the evidence that some time in the fore part of the year 1840, it was agreed verbally between the parties that Watson should go to the city of Macon, and bring home to Johnson some slaves of hers which were in that place; and also to

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Columbus, and catch and bring home to her a fellow of hers, which was lurking about the city. He was likewise to attend to her business for two years; and for these services she agreed to let him have Jerusha, the negro sued for, valued at five hundred dollars. The woman at the time of the contract was not present, being hired out in Columbus; and it was understood that Watson was to go and get her when her time of hiring had expired. Watson, in pursuance of the agreement, brought home to Mrs. Johnson her slaves, both from Macon and Columbus, being absent some seven days in the two trips; and the witnesses considered his services worth a dollar a day. He attended to her business during the years 1840 and 1841, and the proof was, that this service was worth five hundred dollars. At the expiration of the year 1840, Watson went after Jerusha, and took her in possession. Within a few days thereafter, at the request of Mrs. Johnson, he exchanged the girl with her for another by the name of Lucy, which was understood by the parties to be a temporary swap only, made on account of Lucy's bad habits, and with a view to their correction by Watson. Mrs. Johnson, after thus obtaining the possession of Jerusha, refused to return her, and the suit below was brought for her recovery.

The defendant's counsel moved a nonsuit, on the ground that the contract was within the statute of frauds, there being no note or memorandum thereof in writing, signed by the party sought to be charged therewith, nor any delivery of the slave, nor any earnest money paid, to bind the bargain at the time it was made; and because said contract was not to be performed within a year, which motion the court below overruled. And in his charge to the jury, the presiding judge submitted to them upon the testimony, to find whether or not there had been a delivery of the property: to all of which the defendant below by his counsel excepted. And the question for us to examine is, does this contract fall either within the 5th clause of the 4th section, or the 17th section of the statute of frauds?

It would be a vain, if not a hazardous effort, for us to undertake to analyze the statute of frauds, and to review the numerous questions and decisions which have arisen upon it; the explanation of which, a distinguished jurist in the country thinks could not have cost a less sum than one million pounds sterling. Ours will be the less ambitious task of stating a few clear and well-established principles, which apply to and must necessarily control the present case.

And we hold, in the first place, that this contract did not *originally* come within the statute. Where A sells goods to B, to be delivered within the year—though the price was to be paid after the period—the contract is not within the statute, (*Boydell vs. Drummond*, 11 East, 152; *Bracegirdle vs. Heald*, 1 Barn. and Ald. 727; *Holbrook vs. Armstrong*, 1 Fairf. 31,) and the reason assigned is, because, in such case, *all that is on one side to be performed*—namely, the delivery of the goods, or a reasonable expectation thereof—is to be done within a year.

In the case of *Donellan vs. Read*, (3 Barn and Adolph. 899,) Littledale, Justice, in delivering the judgment of the court, says: "As to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation th

should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full until after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part." The learned judge, then referring to the case of *Boydell vs. Drummond*, (11 East, 142,) remarks: "Here the contract was not completely executed on one side, and the case was such that in common course of the publication it was not expected that it should be completed in a year." In the case under consideration, it is true that a part of the price was not to be paid within a year. The contract was entered into in the first of the year 1840, and the purchaser was to superintend the business of Mrs. Johnson, during that and the succeeding year, as part payment for the slave. Still, as the girl was to be taken possession of by the vendee, at the end of the time for which she was then hired, and it would seem, from the proof, that it was the Christmas following the trade, and was actually found in his possession, shortly thereafter, and the legality of that possession distinctly recognized, instead of being disputed by her, the seller is surely estopped from defending herself under the statute.

Indeed, having got possession of Jerusha under a contract of exchange, and under an express promise that she was to be redelivered after a short time, she would not be allowed to hold on to the negro, and deny the title of the plaintiff.

Again: it is quite clear, say the authorities, that if there has been a delivery, either actual or virtual, by the vendor, in pursuance of a verbal sale, he has lost the power of retraction, under cover of the statute, if the vendee chooses to treat the contract as complete.—*Roberts on Frauds*, 178. It is unnecessary to stop to apply this doctrine to the obvious facts of the present case.

No fixed rule can be laid down, as to what shall constitute a delivery of goods. One thing, however, is well settled, namely: that there need not be an actual *manual tradition* at the time of sale. In the sale of a ship, for instance, or goods at sea, the delivery must, in the nature of things, be symbolical. Taking an order from the vendor on the ship-keeper, or wharfinger, or warehouseman, for goods, has been held to be a sufficient delivery—to pass the property to the vendee, even if the vendor take the vendee within sight of ponderous articles, and show them to him, and the vendee suffer them to lie where they are, is equivalent to a delivery—*Atkinson vs. Maling*, 2 Term Rep. 462; *Hollingsworth vs. Napier*, 3 Caines' Rep. 182; *Searle vs. Keeves*, 1 Esp. Rep. 598; *Jewett vs. Warren*, 12 Mass. Rep. 300; 11 John. Rep. 178; *ib.* 283; 4 Wheat. 85; 3 Barn. and Ald. 321; *ib.* 680. Here, again, we should deem it a useless consumption of time to show, how fully and completely the contract between Watson and Mrs. Johnson, as it respects the delivery of the woman, is met and embraced in the principles of these adjudications.

But be that as it may, the question of delivery by the vendor and the acceptance by the vendee, is one of fact, which was properly left to the

—*Roberts on Frauds*, 174. The case of *Chaplin vs. Rogers*, (1 East, turned upon this very point. On the circuit trial, before Hotham, for the defendant, objected that the contract of sale was void by

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the statute of frauds ; being for a commodity, no part of which was delivered, and of which there was no acceptance by the defendant. But the learned baron left these questions to the jury, who found for the plaintiff on both points. A rule was obtained, calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial granted, on the ground that the judge had left that as a question of fact for the jury, which he himself ought to have decided, as an objection in point of law, arising on the statute of frauds. Besides, it was insisted that the evidence did not warrant the verdict. Lord Kenyon, C. J.—“ It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it ; for here the report states that the question was specifically left to the jury, whether or not there was an acceptance of the hay by the defendant ; and they have found that there was, which puts an end to any *question of law*. I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it, there must either be a part delivery of the thing, or a part payment of the consideration, or the agreement must be reduced to writing, in the manner therein specified. *But I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery.*” The other judge agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave it to the jury. So thought Judge Hill on the trial below ; and being satisfied with the verdict, he refused a new trial. The jury having found the fact of delivery for the plaintiff, the case is taken out of the statute of frauds. We see no error in this view of the subject.

Admitting, however, that the English statute of frauds and perjuries, (29 *Charles 2.*) the provisions of which prevail in this State is all that its most zealous advocates and admirers claim for it, “ the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights ;” and that no contract for the sale of goods for the price of £10 or upwards, shall be valid, except the buyer shall accept a part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment ; or unless some note or memorandum, or writing of the bargain, be made and signed by the parties, to be charged, or their agents thereunto lawfully authorized ; and that with respect to property, of whatever value, that no contract or agreement regarding the same shall be valid, unless the thing contracted for is to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith. I say, concede all this, and that the contract between Watson and Mrs. Johnson is palpably obnoxious to every part and parcel of both these sections of the statute, nevertheless, this case may be rescued from all entanglement of the kind, upon the principle, *that the statute of frauds has no application to a contract which has been fully performed on both sides.*—*Barton vs. Collyer*, 4 *Bingham*, 309 ; *Shaw vs. Woodcock*, 7 *Barn. & Cress*. 73. Contracts which come within the statute of frauds, are void, not in the sense in which usurious or gaming contracts are, but merely because the court cannot enforce them, unless made out by a particular kind of evidence, prescribed by the statute. Money lost at play, or paid for usury, may be recovered back. Not so money paid on a v

bal agreement to answer for the debt or default of another: If A, in consideration of marriage with B, a widow, agrees verbally to convey the property of his intended wife to her children, and after marriage, fulfills his promise by actually delivering the property, no one would doubt their title.

The case of *Stone vs. Dennison*, (13 Pick.1,) is conclusive to this point, and is sound law.

Reuben Stone had been living for several years with David Dennison, his father being dead: George Eels was appointed his guardian, and it was agreed between all three of the parties, that the plaintiff should continue in the service of the defendant, for his board, clothing, and education, until he should arrive at the age of twenty-one—he being then fourteen years old. When Stone came of age, he sued Dennison for his services, on the ground that they were worth more than the amount of the stipulated compensation. The defendant relied upon the agreement, to which the plaintiff replied the statute of frauds, the agreement not being to be performed within a year, and not being in writing. Chief Justice Shaw, in delivering the opinion of the court, says: "We think the objection is answered, by the consideration that the contract has been completely performed on both sides. The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover upon a *quantum meruit*, as upon an implied promise. But the statute does not make such a contract void. The provision is, that no action shall be brought, whereby to charge any person, upon any agreement which is not to be performed within the space of one year, unless the agreement shall be in writing. The statute prescribes the species of evidence necessary to enforce the execution of such a contract. But where the contract has been in fact performed, the rights, duties, and obligations of the parties, resulting from such performance, stand unaffected by the statute."

In the case of *Boydell vs. Drummond*, (East. 142,) continues the learned judge, a case was put in the argument, of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months. There, as a part of the contract, was the payment of the price, which was not to be performed within the year; a question was made, whether, by force of the statute, the purchaser is exempted from the obligation of the agreement, as to the stipulated price, so as to leave it open to the jury to give the value of the goods only as upon an implied contract. In that case, said Lord Ellenborough, the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part, and the question of consideration only would be reserved to a future period. If a performance on *one side* would avoid the operation of the statute, *a fortiori*, would the entire and complete performance, on *both sides*, have that effect? Take the common case of a laborer, entering into a contract with his employer towards the close of the year, for another year's service, upon certain stipulated terms. Should either party refuse to perform, the statute would prevent either party from bringing any action, whereby to charge the other upon such contract; but it would be a very different question, were the contract fulfilled upon both sides, by the performance of the services on the one part, and the payment of money, from time to time, on account, on the other,

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equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a *quantum meruit*, and recover more? Or, in case of the fall of labor, and the diminished value of the services, could the employer bring money had and received on the ground that, by the statute of frauds, the original contract could not have been enforced? Such, we think, is not the true construction of the statute. We are of the opinion that it has no application to *executed contracts*.

In the case before the court, the evidence shows, that in 1840 Watson undertook to bring home several slaves from Macon, belonging to Mrs. Johnson, a runaway from Columbus, and superintend her affairs for *that* and the ensuing year; in consideration of which, she sold him the negro girl, Jerusha, then hired out at Columbus, and which he was to take in possession at the expiration of the year, or contract of hiring. In the beginning of 1841, he was found in the possession of the girl; exchanged her temporarily for Lucy, another slave, belonging to Mrs. Johnson, for the purpose of accommodating the latter.

He brought home the negroes from Macon and Columbus, and performed the stipulated service. If the negro Jerusha, was delivered, it is quite clear that no part of the agreement remained unexecuted. And that fact has been found by the jury, and we think, in accordance with the weight of evidence.

Upon any view of this case, then, we hold that the judgment of the court below was correct, and ought to be affirmed.

NO. 57.—WILEY BRYANT, Guardian, &c., and ALLEN BEALL, executor of JESSE PYE, deceased, plaintiffs in error, vs. LITTLEBERRY OWEN and WIFE, defendants in error.

The entry of "*parties made*" on the motion docket, in a case where a *scire facias*, to make parties, has been issued, and returned *executed*, is insufficient to make the representatives of the deceased plaintiff, or defendant, parties in the cause.

In such case, there must be a judgment of the court rendered, and entered upon the minutes, before the representatives of the deceased party can be compelled to appear or answer as parties in the cause.

The motion docket is not a record; the entries upon it are mere memoranda for the judge, kept by him for his own convenience.

An execution, issued from a decree of a court of equity against a guardian individually, upon a bill filed against him as guardian, charging him with waste, and seeking to render him liable in his individual, and not in his representative character, and the execution returned *nulla bona*, is admissible in evidence, in a suit upon the guardian's bond against the security.

A guardian's bond is not an office paper of the Superior Court, but of the Court of Ordinary, where the law deposits it. In a suit upon such bond, the party is not entitled to the custody of the original, but to a certified copy only. A copy of such bond, when the original is lost or destroyed, pending the suit, cannot be established under the 49th rule of practice of the superior courts.

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A decree against the guardian is only *prima facie* evidence of a devastavit, as against the security, not conclusive. It is subject to be rebutted by counter-testimony in behalf of the security, who will be permitted to inquire, *ab origine*, into the justice of the decree.

The Court of Ordinary, under the act of 1805, has power to discharge the security of a guardian; in the exercise of which power, the law presumes that the court will so act as not to injure, but to protect, the rights of the ward. A security so discharged is released from *all future*, but not from *any past*, liability. If new security is given, he is bound for the future management of the ward's estate, and also, equally with the discharged security, for any past liability of the guardian.

In a case where the decree against the guardian is silent as to the time when the devastavit by him took place, and where the security was discharged by the Court of Ordinary before the commencement of the suit in equity, in which the decree was rendered, the decree *alone* is insufficient to charge the security in a suit against him upon the guardian's bond. *Aliter* where the security has not been discharged.

This was an action of debt upon a guardian's bond, brought in Merriwether Superior Court, by the justices of the Inferior Court of Putnam county, as a Court of Ordinary for the use of the defendants in error, against Wiley Bryant and Jesse Pye, the said Jesse being then in life, as the surviving obligor in said guardian's bond, (Littleberry Perdev, the other co-obligor, having died before the commencement of the suit.) The plaintiff in error, Wiley Bryant, on the 9th day of Jan. 1826, was appointed guardian of the person and property of the defendant in error, Orra Ann, then Orra Ann Weathers, minor and orphan of Jesse Weathers, deceased, and gave the bond sued on, with Jesse Pye and Littleberry Perdev as his securities.

In addition to the general breach of the conditions of the bond alleged in the declaration, it was specially set forth and alleged, as a further breach, that the defendants in error had filed their bill for discovery, relief and account, against the said guardian on the chancery side of the Superior Court of said county of Merriwether, and in the year eighteen hundred and thirty-eight, obtained a decree for the sum of sixteen hundred and forty-three dollars and thirty-six cents, and cost of suit, and ordering an execution to issue in terms of the law, in case of default of payment of the decree, and that execution was accordingly issued, and returned *nulla bona*; and alleging further, that said Wiley Bryant was wholly insolvent, and unable to pay, and had not paid the amount of said decree or execution, or any part thereof.

The plaintiff in error, Jesse Pye, the security, pleaded that on the 3d day of June, 1833, long before the commencement of said suit in equity, he was, by the Inferior Court, sitting for ordinary purposes, of the county of Putnam, in pursuance of the authority vested in said court by statute, by order of said court discharged and released from liability on said guardian's bond, and the said Wiley was then and there required to give other security.

Upon the first trial, judgment was confessed by the said Pye and the other defendant, reserving the right of appeal, and an appeal was accordingly taken. Afterwards, on the appeal trial, a verdict was rendered in favor of the plaintiffs in error, and a new trial moved for on part of the defendants in error. Pending the motion for new trial, Pye died; and a writ of *scire facias* was sued out for the pur-

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pose of making Allen Beal, executor of said Pye, a party, and was served upon him, and an entry was made on the motion docket of "parties made," but no order to that effect was entered upon the minutes of the court. The counsel for the plaintiff in error resisted the granting of a new trial in said cause. At August Term, 1844, of the court below. said cause again came on to be tried, when, on the part of the plaintiff in error, it was objected that the executor of Pye had not been made a party defendant in said cause, in conformity with the statute in such cases provided, which was overruled by the court below, and the trial proceeded. The counsel for the defendants in error were permitted to establish *instantly*, under the 49th rule of court, a copy of the bond sued on, upon the statement of the clerk and counsel that the same had been in the office, and could not then be found; and offered to read in evidence the copy so established, which was objected to, and the objection overruled, and the established copy was admitted in evidence. The counsel for the defendants in error then read in evidence the record of the proceedings in equity against Bryant, the guardian, and the decree rendered thereon: and then offered in evidence the execution issued from said decree, which had issued against the guardian in his individual, and not in his representative character, with the return of *nulla bona* thereon: to which the counsel for the plaintiffs in error objected, and the objection was overruled. The testimony on the part of the defendants in error was here closed.

The counsel for the plaintiffs in error then offered and read in evidence the record of the discharge, by the Court of Ordinary of Putnam county, of said Jesse Pye, as alleged in his plea, long previous to the commencement of said suit in equity. The counsel for the plaintiffs in error then offered a witness, Vardeman, to prove that Bryant was solvent, having considerable property, to wit: a lot of land and negro in his possession after he came to Merriwether county aforesaid, subsequent to the discharge of the security, Pye, which, being objected to, was overruled and rejected, and the witness was not permitted to testify.

The testimony having closed, after argument of counsel, the court below charged the jury, that the decree against Bryant, the guardian, in the suit calling upon him to account, as guardian, was conclusive on the security as to all sums received before the discharge, which had not been accounted for; and if the money or effects of the ward came into the hands of the guardian, before the discharge of the security, and had not been accounted for, then they must find a verdict for the defendants in error, who were the plaintiffs below. And that the charge of waste, had relation back to the time the money or effects of the ward were received by the guardian, and the security was liable for the amount of such money and effects unaccounted for; and no other evidence of waste by the guardian was necessary to charge the security, other than the reception of such effects by the guardian before the discharge of the security, provided said guardian had failed to pay over or account for the same. The jury, under this charge, and the evidence submitted, rendered a verdict for the defendants in error, for the full amount of said decree, with interest and costs. Whereupon the counsel for the plaintiffs in error moved for a new trial, upon the following grounds:

1st. Because there was no order of the court, making the legal re-

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representatives of Jesse Pye, deceased, a party to said suit, except an entry upon the motion docket.

2d. Because the court erred in permitting the execution against Wiley Bryant, in his individual capacity, to be read as evidence of waste on the part of Wiley Bryant, as guardian.

3d. Because the court erred in permitting a copy of the guardian's bond, taken by the Court of Ordinary of Putnam county, to be established *instantly* as an office paper, and to be read on the trial of said cause; it appearing, from the statement of the counsel and the clerk, that it had been in the office, and could not be found.

4th. Because the court erred in charging the jury that the decree against Bryant, as guardian, in the suit, calling upon him to account as guardian, was conclusive upon the security as to all sums received before the discharge, which had not been accounted for.

5th. Because the court erred in charging the jury that, if the money or effects of the ward came into the hands of the guardian before the discharge of the security, and had not been accounted for, then they must find a verdict for the plaintiffs below.

6th. Because the court erred in charging the jury that the charge of waste had relation back to the time the money or effects of the ward were received by the guardian; and the security was liable for the amount of such money and effects unaccounted for; and no other waste by the guardian was necessary to be shown to charge the security, other than the reception of such effects by the guardian, before the discharge of the security, provided he had failed to pay over or account for the same.

7th. Because the plaintiffs below, in alleging a breach of the bond in their declaration, allege the waste to have been committed by the guardian, Bryant, before the security was discharged; and there was no evidence showing that the waste was committed by the guardian, before the discharge of the security, other than that afforded by the records read in evidence.

8th. Because the court erred in rejecting the testimony of Vardeman, a witness, who was offered to prove that Bryant was solvent as aforesaid.

9th. Because the verdict of the jury was contrary both to law and evidence.

At February Term, 1846, of the Superior Court of said county of Merriwether, this motion for a new trial came on to be heard before Judge Hill, and after argument of counsel had thereon, the court below overruled the same, deciding against and overruling each of the grounds taken in said motion for new trial. To which the counsel for plaintiffs in error excepted, and assigned error upon each of the grounds taken for a new trial.

OBADIAH WARNER, for the plaintiff in error.

As to the first ground of error:

1st. The legal representative of Pye was, by the judiciary act of 1799, required to be made a party by *scire facias*.—*Prin. Dig.* 482.

A *scire facias* is a judicial writ, and is considered in law an action. *4's Prac.* 982.

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2d. Parties were not made, until there had been an order or judgment of the court making them so, to the action pending in the court on which the verdict was rendered.

As to the 2d ground:

1st. The *fi. fa.* was read in evidence, to establish waste against Bryant, as guardian. How can execution against Bryant, in his *individual* capacity, and a return of *nulla bona* upon it, establish waste? It might be evidence that he had wasted his own property, or, at least, that he had no *individual property*. But can such an execution, with a return of *nulla bona*, be any evidence that the guardian had wasted the property of his ward? Bryant, as guardian, might have had in hand the entire property of his ward, and the return of *nulla bona* on this *fi. fa.* been correctly made.

2d. The plaintiffs below allege in their declaration, that *Bryant, as guardian*, wasted his *ward's* property, and not his *individual* property. The sheriff could seek after, and levy upon no other property, but the *individual* property of Bryant. This *fi. fa.* with the return upon it, was no evidence that the sheriff had sought after the ward's property in the hands of the guardian, and could find none, and therefore it was wasted by the guardian.—See *Brown vs. Hillegas and wife*, 2 *Hill's S. C. Rep.* 449. There is a distinction between property held in one's own right, and property held in *auter droit*.—*Toller's Exors.* 133.

To have afforded evidence of waste by the guardian, the execution should have followed the decree, and issued against Bryant as guardian.

As to the 3d ground of error:

1st. The rule of the Superior Court only authorizes the establishment of such papers *instantly* as are, in contemplation of law, *office papers*. The bond in question was required by law to have been filed in the clerk's office of the Court of Ordinary of Putnam county. A certified copy thereof might have been read in evidence.—*Act of 1823, Prin. Dig.* 217.

2d. The fact that the bond had once been in the clerk's office of the Superior Court of Merriwether county, does not alter the question. When it could not be found, the presumption of law was, that it had been returned to the proper office in Putnam county, *where it belonged*. At any rate, search should have been made *there* for it, before *secondary evidence* was admitted.—1 *Greenleaf's Ev.* 623, 624.

3d. The original bond was the *best evidence*. There was, in fact, *no proof* of its destruction: because it had once been in the clerk's office of Merriwether, and could not be found *there*, was *no evidence* of its loss. The bond was not in *that office* by legal authority, and the depositing *it there*, was only a voluntary act of the person placing it there, and he could take it away whenever he might think proper to do so.

As to the 4th ground of error:

1st. From an inspection of the record, it will be seen that Pye, the security, was no *party* to the suit, in which the decree was obtained, and had no notice. On the 3d of June, 1833, Pye was discharged from his securityship: on the 13th of July, 1836, three years after his discharge, the bill was filed, calling upon Bryant, the guardian, to account: in March, 1838, nearly five years after the discharge of Pye, the decree was had, which was held, by the court below, conclusive upon the secur-

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The suit on the guardian's bond was instituted on the 28th of January, 1839. The defendant, Pye, relied for defence on his discharge by the Court of Ordinary of Putnam county. The act of 1805 was a remedial statute, and should be construed liberally.—*Bl. Com.* 87.

2d. The Court of Ordinary had jurisdiction to discharge Pye.—*Prin. Dig.* 237. The judgment of the Court of Ordinary of Putnam county, discharging Pye, was *conclusive upon that point*, in any other court, unless impeachable for fraud and collusion.—1 *Stark. Ev.* 227, 241.

3d. The decree upon its face does not purport to charge the guardian with failing to account for money or effects of the ward, received by him *prior* to the discharge of the security.

4th. The legal effect of the charge to the jury, by the court below, is, to make the security liable to the amount of the decree against the guardian, made several years after his discharge, to which *he was no party, had no notice*; and which does not purport to charge the guardian with any *maladministration* of his ward's effects, during the period Pye was security. Why should the decree be conclusive against Pye, more than against any other person? He was no security when the bill was filed or decree made. So far as the record shows, the guardian was never called on to account, until *after* the discharge of the security. But the decree was not conclusive upon the security.—*See Kip vs. Brigham*, 6 *Johns. Rep.* 158; *Carmack et. al. vs. The Commonwealth*, 5 *Binn. R.* 184; 15 *Mass. Rep.* 6; 2 *Hill's S. C. Rep.* 313.

The 5th, 6th, 7th, and 9th grounds of error are considered together.

1st. The reception of the effects of the ward by the guardian was no waste. It was the duty of the guardian, under the law, to have taken possession of them, and it was his duty to keep possession, until his ward arrived at age, married, or until they were demanded by some person authorized by law to receive the property from him.

So far from the reception of the effects of the ward by the guardian being evidence of waste, it would have been a breach of his duty, and a violation of his obligation as guardian, to have refused to take charge of them.

2d. It is the *demand*, and a *failure to account on demand*, when made by a person authorized by law to make it, which constitutes the liability of the guardian. There is no breach of duty until this is done, and no default on his part until such demand is made.—*See Vaughan vs. Evans*, 1 *Hill's Ch. Rep.* 414; *Townsend and Gordon vs. Everett*, 6 *Ala. Rep. N. S.* 607; *the Governor vs. Robbins*, *Ala. Rep. N. S.* 79; *the Executors of Moore vs. the Treasurer*, 1 *Nott and McCord*, 214; *Wright vs. Hamilton*, 2 *Bailey*, 51.

3d. The doctrine is, that the security is bound for the effects of the ward which are wasted by the guardian, while he is security, and the security is only liable for such acts of *maladministration*, by the guardian, which take place while he remains security.

4th. The court below, before whom the cause was tried, says, in its charge to the jury, that no other evidence of waste by the guardian was necessary on the part of the plaintiff, to charge the security, other than the reception of the effects of the ward by the *guardian* before the discharge of the security, provided he had failed to pay over and account the same.

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The proper interpretation of this part of the charge, and the construction which the jury undoubtedly placed upon it, was, that if the guardian, while Pye was his security, received the effects of the ward, and at any future time, and even though that time may have been after the discharge of Pye, the guardian had failed to account for these effects, this failure to account, at *this future time*, was such waste on the part of the guardian as to make the security liable. Our position is, that it is not sufficient to show the reception of the effects of the ward by the guardian before the discharge of the security, and his failure to account for these effects, at *some subsequent time*; but that the plaintiffs below must go farther, and show that the guardian failed to account for these effects, to a person legally authorized to call upon him to account, *while Pye was his security and before his discharge*.

The court below committed error in law, when it charged the jury, "that a failure to account, at any subsequent time, was waste on the part of the guardian, and *related back* to the time when he received the property of his ward."

The doctrine of relation is a legal fiction; that is, "where one thing is done to day, is considered as done on a preceding day."—1 *Bouvier's Law Dic.* 564. It is only resorted to in cases of necessity for purposes of justice.—1 *John. Ch. Rep.* 297. Chancellor Kent says: "that it is a general principle of law, that in all cases, where it becomes necessary, for the purposes of justice, that the true time when any legal proceeding took place should be ascertained, the fiction is not to prevail against the fact."—4 *Kent's Com.* 454. The doctrine laid down by the court below is, that the guardian in July, 1836, the time when the bill was filed against him to account, (there being no evidence that he was ever called on to account before that time,) by failing to account for his ward's effects *then*, by a legal fiction, committed waste of these effects more than three years before that time, and while Pye was security.

The testimony, the fact, makes the waste to take place long after Pye's discharge; but fiction, more potent than truth, makes it occur before his discharge. The application of this fiction was indeed necessary in this particular case, not for the purpose of justice, but to reach Pye, the security.

5th. It was incumbent on the plaintiffs below to prove a breach of the bond by the guardian, and, in order to bind Pye, that this breach occurred while he was security.

The counsel for the plaintiffs below seem to have thought it necessary, in their declaration, to allege a breach of the bond while Pye was security; and if necessary to make the allegation, it was necessary to prove it.—1 *Greenleaf's Ev.* 89.

6th. By the common law practice of pleading, when the defendant pleads a special plea in bar (as in this case) to the plaintiff's action, the plaintiff replies: in the present case, under the common law rule of pleading, the plaintiffs below would have been compelled to have filed their replication, alleging the waste by the guardian to have been committed before the 3d June, 1833, the date of Pye's discharge; and on the trial would have been held to the proof of it.—1 *Chitt. Pl.* 599; *Tidd's Prac.* 636, 637; *Trimmier vs. Trail*, 2 *Bailey*, 484. In "

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last case it was held, "*that the replication must show a liability existing before the discharge of the security.*"—See also *Gould's Plead.* 92, sec. 70, 71, 72.

By our statutes of 1799 and 1818, the case goes to the jury on the petition and process of plaintiff, and the answer of defendant alone.—*Prin. Dig.* 421, 442. But the common law is not altered, as to the proof required on the part of the plaintiff at the trial.

7th. The evidence introduced on the part of the plaintiffs below, on the trial, shows no waste of the effects of the ward by the guardian, prior to 3d June, 1833, the date of the discharge of the security. That evidence consisted of the guardian's bond, the bill in equity against Bryant, filed by the plaintiffs below, in July, 1836, a decree thereon in favor of the plaintiffs against Bryant, for \$1643 36 and a *fi. fa.* with a return *nulla bona* upon it by the sheriff, dated 19th Jan. 1839.

This record, introduced in evidence on the part of the plaintiffs below, furnishes *no proof* of waste by the guardian, before the 3d of June, 1833. It affords *no evidence* that a demand was made by any person on the guardian, prior to that time, for his ward's property; *no evidence* that the guardian before *that date* had converted a single dollar of his ward's effects to his own use, or that he had in any way mismanaged her property; *no evidence* that the ward had arrived at age, or that there was any person in existence before the date of the discharge of the security, who was authorized by law to make a demand upon the guardian, or to receive the property of the ward. On the contrary, the evidence shows that the marriage of the ward did not take place until some eighteen months after Pye's discharge, and that there was no demand made upon the guardian until after the marriage.

From aught that appears from the plaintiff's testimony, the property of the ward was *all* in the hands of the guardian, without injury or diminution, on the 3d June, 1833.

The decree itself is no evidence as to the time of the waste. It is only evidence that *at the date of the decree*, the guardian was indebted to the ward in the sum of \$1643 36, and unaccounted for at *that time*. The return of *nulla bona* upon a *fi. fa.*, said to have been issued upon the decree made on the 19th of Jan. 1839, only goes to show that the guardian was indebted to his ward the amount of the decree, at the time it was made, and his failure to pay that decree, and establishes waste at *that time*, but at *no other time*.

As to the eighth ground of error:

The testimony of Vardeman was offered to prove that Bryant was solvent, subsequent to the discharge of the security. The testimony was competent to rebut the evidence of the plaintiff below of insolvency. If the absence of property on the 19th of Jan. 1839, the date of the return of *nulla bona*, was to be received as evidence of waste before the security was discharged, certainly the possession of property by Bryant, subsequent to the date of the discharge, and before the return of *nulla bona*, would be just as good evidence, to show he had not wasted his ward's effects before the discharge.

It was certainly good to rebut a fiction.

W. D. ALEXANDER, for the defendant in error, contended, in reply to the first ground taken in the assignment of error, that an order, making

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the legal representative a party, was not necessary at common law, nor by the English statutes, nor by the statutes of Georgia, nor by any published rule of practice. At common law, a suit abated when the death of a party was suggested.

A *scire facias* is the creature of an English statute, which provides that parties shall be made by *scire facias*, and not by an order. The statute of Georgia provides that parties shall be made by *scire facias*.—2 *Tidd's Prac.* 1114, 1117; 1 *Ld. Ray.* 245; *Prin. Dig.* 422. An order is the will of the court, judicially expressed, and an entry on the bench docket constitutes such an order. The minutes of the court are not the acts of the court, but a mere memorandum, memorial, or record of those acts, and an entry on the docket, made by the court, is in point of grade testimony of equal dignity. There is no practical purpose for which such an order is required. It cannot be to complete the record, because the *scire facias* becomes a paper of record, and shows the change of parties, and makes the record as complete as in the case of original process, where the defendant is brought into court, and made a party without an order. It is a well-settled principle that a party cannot submit his rights to adjudication, and then, when the court has determined against him, except to the process, or take advantage of the absence of process. The legal representative appeared in court, and resisted the motion for a new trial, without making the exceptions.

To the second ground, Mr. A. replied, that the decree could only have been rendered against the defendant, *de bonis propriis*. It could operate against him in his individual, and not in his fiduciary, character.—2 *H. and M.* 26; 2 *Munf.* 325; 2 *Munf.* 421; 2 *Robinson's Prac.* 393.

To the third ground, he replied, that the provisions of the statute of Georgia, in relation to the admissibility of copy bonds, was cumulative. If the original could be obtained, it was certainly competent to found the action on it; and as the foundation of the action, it became an office paper in the court where the action was pending. The loss of it being accounted for, a copy, established under our rules of practice, was competent testimony, and higher testimony than a certified copy; because the latter would have been a copy of a copy.

To the fourth ground he replied, that the decree was *prima facie* evidence of a *devastavit*, and conclusive against the guardian as to the amount; but did not preclude the security from looking into the decree, to see whether he was properly chargeable with the amount decreed.—1 *McC. R.* 379; 3 *McC.* 225.

To the fifth and sixth grounds, which involve the legal effect of the discharge, he replied, that the act of the Legislature was inferential in its terms, and in express language meant, "that upon failure to show cause, the court shall have power to discharge the security from his securityship, and compel the guardian to give new security, or his guardianship shall be revoked." Two acts are implied on the part of the guardian, before the security can be discharged: one, an act of omission, the other, an act of performance. He must fail to show cause, and must likewise give new security.

If he fails to give new security, then the court is thrown upon the alternative provided by the statute, that is, a revocation of the letters of guardianship, which leaves the liability of the security where the

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of revocation found it. Conceding the discharge to be regular, Mr. A. laid down the proposition, that it only released the security from *future*, and not from *past*, liabilities. He insisted that, in legal parlance, the word *liable* meant to be bound, to be answerable, and that, in this sense, the liability of the security commenced at the time of the execution of the bond; and that the proper and safe measure of liability was the amount received by the guardian *before* the order of discharge. So soon as the guardian received any part of the guardianship fund, to that extent the liability of the security immediately attached. In other words, the security was bound, or liable, until the guardian discharged his liability, by accounting for, and paying over, the amount which had come into his hands. The liability of the security did not necessarily imply a breach of the contract, or that a right of action had accrued before the discharge. His liability commenced with the execution of the bond, and its extent was ascertained by the amount received by the guardian *before* the order of discharge. In the case before the court, every dollar charged against the security, was received by the guardian *before* the order of discharge was made. The liability of the security attached and continued, unless the guardian has shown that he has discharged the same, by accounting, or by making a legal and proper application of the amount received. He has failed to do this. A liability was, therefore, incurred by the security before the discharge, and could not be affected by it without impairing the obligation of the contract.

The decree and *fi. fa.*, with the return of *nulla bona*, established the *devastavit* on the part of the guardian, and the amount of that *devastavit*. The security may look into the decree, to ascertain whether any of the items going to make up the amount of the decree were *received* by the guardian *after* the order of discharge was made. It was immaterial whether the breach of the contract occurred, or a right of action accrued, *before* or *after* the discharge. If it appears that the amount was *received* by the guardian before the discharge, and a *devastavit* has been established by a decree, and a *default*, by return of *nulla bona*, it is sufficient to charge the security.

Mr. A. contended, that he had seen no reported case in which the plaintiff was required to prove actual waste by the guardian, or to prove *affirmatively* any act of malfeasance or nonfeasance on the part of the guardian, before the order of discharge, other than the reception of the fund by the guardian, and his subsequent failure to account. In support and in illustration of these views, Mr. A. relied on the cases of *Shelton vs. Cureton*, ordinary, 3 *McC. Rep.* 413; *James Commissioner vs. Malone et al.*, 1 *Bailey's Rep.* 334; *Trimmier Ordinary vs. Trail*, 2 *Bailey's Rep.* 481; *Ordinary vs. Bigham and Hudson*, 2 *Hill's Rep.* 512; *Alexander vs. Bullard and Doby*, *Rice Eq. Rep.* 23; *Field vs. Felot*, 1 *McMullan's Eq. Rep.* 370.

To the 7th ground he replied, that time in this case was not a material allegation in the declaration, (1 *Chitty's Plead.* 3 *J. R.* 43,) and that the declaration contained, without relation to that allegation, a sufficient cause of action. The declaration was framed with reference to the doctrine of relation, which is a legal fiction, resorted to for the purpose of accomplishing the ends of justice.

On the 8th ground he replied, that the evidence was inadmissible, be-

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cause it proved nothing; and that the return of *nulla bona* was higher testimony, and conclusive of the insolvency of the guardian. He contended, that substantial justice had been done between the parties by the verdict; and that when it appeared that substantial justice had been done, a new trial should not be granted; and that this was a sound, safe, and sensible rule.

O. WARNER, in reply, concluded, in behalf of the plaintiffs in error.

His Honor HIRAM WARNER, one of the judges of the Supreme Court, having been of counsel in the court below in this cause, gave no opinion.

By the Court—NISBET, Judge.

The bill of exceptions in this case recites, that Wiley Bryant was, on the 9th day of January, 1826, by the Court of Ordinary of Putnam county, appointed guardian of Orra Ann Weathers, a minor; Jesse Pye and Littleberry Perdew were the securities on his bond. Perdew died before any of the proceedings on this record were instituted. On the 3d day of June, 1833, Jesse Pye, upon his application, under the act of the Legislature of Georgia, was discharged by the Court of Ordinary of Putnam county from his suretyship aforesaid. About eighteen months after Pye's discharge, the minor, Orra Ann Weathers, intermarried with Littleberry Owens. On the 13th July, 1836, Littleberry Owens and his wife filed a bill against Wiley Bryant, calling upon him to account as guardian; and, afterwards, to wit, in the year 1838, a decree was had in their favor against him, before the Superior Court of Merriwether county, for the sum of \$1,643 36, and cost of suit; upon which decree execution issued against Wiley Bryant, personally, and was returned, with the entry of *nulla bona*. In January, 1839, the present suit was brought upon the guardian's bond, to recover of Pye, the surety, the amount of said decree. In addition to the general breach assigned, the plaintiffs also set forth, as special breaches, the insolvency of the guardian, and the proceedings on the bill in equity, viz., the decree, and the return of *nulla bona* on the *fi. fa.* The defendant, Pye, plead his discharge by the Court of Ordinary of Putnam county, anterior to the decree rendered against his principal.

Upon the first trial of the cause, judgment was confessed for the plaintiffs, and an appeal entered by the defendants; and on the appeal trial, a verdict was had in favor of the defendants. A new trial was then moved by the plaintiffs. Pending the rule *nisi*, for a new trial, Pye died, and *scire facias* was sued out to make his representative a party. The *sci. fa.* was served on Allen Beall, executor of Jesse Pye, deceased, and returned. Upon the return of the *sci. fa.* a verbal motion was made, to make Beall, executor, a party to the cause, and he was accordingly made a party, and the only evidence of the judgment of the court making him a party, which the record affords, is an entry on the bench docket in these words, to wit: "parties made." Afterwards counsel for the executor of Pye appeared, and resisted the granting a new trial. A new trial was, however, granted, and when the

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was thereafter called for trial, Beall, executor of Pye, objected, that he had not been made a party to the suit regularly; because the judgment of the court upon the return of the *sci. fa.* was not entered upon the minutes; or, in other words, it did not judicially appear that he had been made a party at all. This objection was overruled, and the trial proceeded. Upon the trial, it appeared, from the statements of the clerk of the court, and of counsel for the plaintiffs, that the bond sued on had been filed in the office of that court, and was lost. Whereupon the plaintiffs were permitted to establish, under the rule of court, a copy of said bond instanter. This copy bond being then tendered in evidence, was objected to by the defendant, and admitted by the court. The record of the proceedings in equity against Wiley Bryant, including the decree, was then read to the jury by counsel for the plaintiffs. The execution issued against Wiley Bryant individually, being tendered, was demurred to by the defendant, and admitted by the court.

The defendant's counsel, the plaintiffs having closed, read in evidence the judgment of the Court of Ordinary, of Putnam county, discharging Pye from his suretyship, and offered a witness to prove that Bryant had in possession considerable property, and was in fact solvent, after the discharge of his surety; which testimony being objected to by the plaintiffs, was excluded by the court.

The court then charged the jury, and verdict was rendered for the plaintiffs for the full amount of the decree. Whereupon the defendant moved a new trial, upon nine several grounds, all of which were overruled by the court, and a new trial refused. The error assigned is, the refusal of the court to grant the new trial upon each and all the points made in the rule. We make this statement of the facts, in consecutive order; because necessary, as we believe, to an easy comprehension of the opinions in this important cause we now pronounce.

The first ground taken in the rule for a new trial is, "there was no order of the court, making the legal representative of Jesse Pye, deceased, a party to the suit on the guardian's bond, except an entry on the motion docket of 'parties made.'" The statute of 1799 authorizes, in case of the death of a party defendant, his representative to be made a party by *scire facias*.

In the case of *Alfred P. Reed*, plaintiff in error, vs. *James Sullivan*, tried at Americus in July last, this court determined that a *scire facias* is a judicial writ, but because it may be plead to, it is in the nature of an action.—*Tidd's Prac.* 1090; *Coke Lit.* 290, b.; 2 *Wils.* 251.

In England, at common law, the death of a sole plaintiff or defendant, at any time before final judgment, would have abated the suit.—*Tidd's Prac.* 1116. These parties are made by statutes.—17 *Chas.* 2, and 8 and 9 *William* 3.

These statutes are not repugnant to our act of '99 upon the same subject, so far at least as relates to the right of the representative to appear and show cause against the writ, when in default, so far as relates to the power of the court to proceed against him, they are not in conflict with our act of 1799. By the statute, 8 and 9 *William* 3, the right of answering the *sci. fa.* is given to the representative of a deceased defendant; and if, being warned, he fail to show cause, a writ of damages is awarded against him.—*Tidd's Prac.* 1117. So.

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here, under our own statute, and also so far as it does not repeal them, under the English statutes, the representative may show cause against being made a party (for example, he may show that twelve months have not expired); and if he fails to appear, or, appearing, fails to show cause—being in default—the court will order the cause to proceed against him. Now, the right to plead to the *scire facias*, of necessity implies the power of the court to pronounce judgment upon the issue made, and if the party being entitled to plead makes default, the power—nay, the duty of the court, to give judgment, as in other cases of default—is conclusively demonstrated. We are, therefore, of the opinion that, upon the return of the *scire facias*, a judgment of the court must be pronounced. The next inquiry is, what is the evidence of the judgment of the court? We think the record is the only evidence of what the judgment of the court is; the record is tried by inspection, and, if the judgment does not there appear, the conclusion of law is, that none has been rendered. The record in this case does not show that the representative of Jesse Pye, deceased, was made a party, by judgment of the court upon the return of the *scire facias*. Judicially, therefore, we infer that he has not been made a party; *unless* the entry of “parties made” is part of the record. We think the motion docket is no book of minutes. The entry of “parties made” is not a judgment, and if it was, it ought to appear on the minutes. The motion docket is but a memorandum book, and its entries only memoranda, kept for the convenience of the judge, in conducting the business of the court. By the 34th sec. of the act of 1799, (*Prin.* 428,) it is made the duty of the clerks to keep regular and fair minutes of all the proceedings in their courts. The record of this cause does not show that the clerk has kept regular and fair minutes of all the proceedings of the court below; but, on the contrary, a very material item in the proceedings of the court, upon the supposition that this judgment was rendered, has been omitted. The same section of the act of '99 makes it the duty of the presiding judge to sign the minutes daily. This obligation to *sign*, if it means anything, means that he shall examine the minutes, and see to it that they contain, and correctly report, all the proceedings of the court, in every case. And his signature is his official attestation that the minutes are both correct and complete. Can we therefore—could any court—admit anything to be a part of the proceedings in this cause, not thus certified by the presiding judge? The judge does not sign his motion docket, but his minutes. In England it is necessary that the record should be drawn up in form, before a copy of it can be given in evidence. *A judgment paper, signed by the officer, is not evidence of a judgment.*—*Tidd's Prac.* 943; *Buller N. P.*, 228.

It concerns judicial responsibility, the rights of property, of life, liberty, and character, that the records of judicial action should be complete, correct and permanent; and further, that they be *attested* to be records, in authoritative form. We have no hesitation in saying, that the court erred in refusing the rule on the first ground.

The *second* ground for the new trial is, that the court erred in permitting the execution against Wiley Bryant, in his individual capacity, to be read in evidence, as proof of waste on his part as guardian. As we express no opinion as to how far this execution, with a

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nulla bona, will go, under the circumstances of this case, to establish waste; we shall reserve that subject for other heads of error taken in this cause. We do not perceive that the fact of its being against Bryant, the guardian, in his individual character, is a well-founded objection to its admissibility.

The bill in equity was brought against Bryant as guardian, charging a *devastavit*, and seeking to make him liable in his individual, and not in his representative, character; the decree was properly rendered against him personally, and the execution very properly followed the decree. We therefore think the presiding judge did not err in refusing the rule on this ground.

The *third* ground for a new trial is, that the court erred in permitting a copy of the guardian's bond, taken by the Court of Ordinary, of Putnam county, to be established *instantly* as an office paper, and to be read in evidence on the trial of the cause.

The 49th rule of court (*Hotchkiss*, 949) provides that upon the loss of any original declaration, plea, indictment, or other *office papers*, a copy of the same shall be established *instantly*. It was under this rule, that the court below allowed the copy of the bond to be established. Does the rule contemplate a guardian's bond? Is a guardian's bond an office paper? We do not think that it is an office paper.

This rule was no doubt originally designed to embrace the pleadings in the case, and such other papers as belong to the office of the clerk of the superior and inferior courts, as papers of file. We are aware that it has been extended to notes and other papers, the foundation of pending actions, before final judgment thereon. The private papers of a party are not office papers; they are not deposited in office by the law. If filed in office voluntarily, that fact does not make them office papers. They are still the property of the depositor, and may be withdrawn by him. After final judgment on a note, bond, or bill, it may be conceded that they become office papers, and cannot be withdrawn but by an order of the court. A guardian's or administrator's bond, however, occupies very different ground from these. They are not the property of the parties; they belong to the Ordinary; they are the office papers of the Ordinary, placed of file there by the law.—*Prin.* 244, 245. There they are to remain. How the plaintiffs in this cause became possessed of the original, does not appear. They are not entitled to that possession, and the possession does not make the bond the property of the plaintiffs; if it did, it is still not an office paper of the Superior Court. The testimony shows that it had been in the office of the Superior Court, and was lost; its having been in that office does not make it an office paper. The testimony does not show that application to the Court of Ordinary of Putnam county was made for a certified copy, before the copy was established *instantly*. That is the legal depository of this bond. From aught that appears, it was there. But, if lost, the mode to establish a copy, was by rule and notice, &c. This is an official bond, and is on that account an office paper of the court which takes it, and to which it is made payable. Guardian's and administrator's bonds, in many instances, are intended to protect the rights, not alone of one, but of many; as in case of several wards of the same guardian, or all distributees of the same estate. It cannot, therefore, be rightfully

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controlled by any one ; very properly, therefore, the Court of Ordinary is made the custodian. The act of December, 1823, in view of these things, makes a certified copy of these bonds evidence ; notwithstanding this act, the original, if presented, is the best evidence ; but it does not follow, that because the original is evidence, the act of 1823 being cumulative, therefore a copy established *instantly*, is the next best evidence. A certified copy, we think, was, in this case, the next best evidence to the original ; and if that (the original) was lost, a copy could not be established *instantly* ; and for these reasons we think the court erred in refusing the rule on the third ground.

I shall consider the 4th, 5th, and 6th grounds for a new trial, specified in the rule, together, as they present only different heads of a general subject. In these specifications are involved the inquiries, whether the decree, against the guardian generally, is conclusive against his surety ? Whether the facts of effects belonging to the ward, having come into the possession of the guardian before the discharge of the surety, is of itself such evidence of waste as will charge the surety ? How far the discharge of a surety, by the Court of Ordinary, upon his own application, under our statute, releases him from liability on his bond ? And whether a decree against the principal, rendered long after his discharge, is evidence of waste against his surety ? This, I believe, is a correct summary of the questions raised in the 4th, 5th, and 6th specifications in the rule. The specifications themselves need not be here repeated. The most of these questions have been decided by this court—see the case of *Woods vs. Vason*, decided at Milledgeville, in May last, *ante*, p. 84. They were reviewed in that case, by the court, after very extended and profound argument. The case now under review has been also ably argued, and after this second hearing, of substantially the same points, we find no cause to change the judgment pronounced in *Woods vs. Vason*. The first query, to wit, whether the decree against the guardian is conclusive against his surety, in an action on the bond, we shall consider, for the present, wholly irrespective of the discharge. Is the surety estopped by it, or may he look into it ? Is it conclusive, or only *prima facie* evidence of waste ? In the judgment of this court, it is only *prima facie* evidence of a *devastavit*. The surety, to use again the language of some of the courts, may *look into it*. It becomes important to determine what is meant by this phraseology.

In *Joyner vs. Cooper*, 2 *Bailey*, 199, the court says, that the surety may look into the decree, “ in order to see that he is charged only for the accounts or duties, the faithful discharge or performance of which he has undertaken to guaranty.” We are unwilling to limit the rights of the surety to a *looking into the decree*, as in that case defined. We believe that the decree is evidence against the surety, until he shall rebut it by counter-testimony ; and that he is permitted to inquire, *ab origine*, into the justice of the decree. He is not restricted to the inquiry, whether the decree charges him only for such accounts or duties, the faithful discharge or performance of which he has guaranteed. But he may make inquiry into the correctness of those accounts, or into the faithful performance of those duties ; or he may set up any defence which the principal could set up against the rendition of the decree ; or which he could have set up, had he himself been a party to the pro-

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ing. We are satisfied that the rule thus laid down is sustained by the authorities, and it is clearly founded in equity. Is it not enough that a decree "*inter alias*" is *prima facie* evidence against a party having no notice? In *Carmack vs. Commonwealth, for the use, &c.*, 5 *Binney*, 184, after judgment in trover against a sheriff, who had levied an execution against A upon the property of B, in an action against the sheriff and his sureties, the court determined that the sureties were not liable for the amount of the judgment in trover, in consequence of their bond. The suit in this case was *scire facias*, to which the sheriff, as well as the sureties, was a party.

Tilghman, C. J., in delivering the opinion of the court, holds this strong language: "It is contended, however, that inasmuch as the sheriff was the defendant in the action of trover, he certainly is bound by the judgment in it, and, therefore, the other defendants, in this joint action, must be bound also. This is a very subtle attempt to cut off the sureties from all possibility of being heard; but it is too unreasonable to be sanctioned by law." This reasoning applies to the case at this bar, with all its force. A decree is first had against Bryant, the guardian, and afterwards a joint action is brought against him and his sureties on their bond; and counsel for the plaintiff in error contends, that, inasmuch as the decree is binding upon the guardian, it is also binding upon the other defendant. We reply, as the court in Pennsylvania did, this is a very subtle attempt to cut off the sureties from all possibility of being heard, and is too unreasonable to be sanctioned by law. In *Daves et al vs. Shea et al*, 15 *Mass. Rep.* 7, it was determined that where judgment had passed against an administrator, in an action barred by the statute of limitations, in an action against the sureties on his bond, they were not bound by the judgment, but might plead the statute of limitations. So also in the *Ordinary vs. Condy*, reported in 2 *Hill*, 313, it was decided: that a judgment or decree against an administrator, is *prima facie* evidence against his surety, but not conclusive; and in an action against the surety on the administration bond, he may give in evidence to show that a prior decree against the administrator was, in fact, for his personal debts. In this case, the authorities, English and American, (in an exceedingly able opinion,) came under the review of Chancellor Harper. The result of that review was as above stated.

The surety now before this court was not a party to this suit in equity; he had no notice, so far as the record discloses, of its pendency: of course he was not heard in his own defence in that suit. It is contrary to natural justice, and also to all the analogies of the law, that one should be estopped by a decree to which he was not a party, and of which he had no notice. Such a rule would most effectually oust the security of his day in court. His rights would, by such a rule, depend upon the diligence or the fidelity of others. The principal might collude with the complainant, and permit an iniquitous decree to be rendered against himself, in order to charge his surety. Human nature is, unfortunately, not too good for that; or his carelessness or neglect might work irreparable injury to the surety. The reason for our opinion is as strong as the authority is conclusive.

general rule is, that no one is bound by a judgment or decree,

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but parties and privies.—*Duchess of Kingston's case*, 20 *State trials*, 538. The general meaning of *privies* includes those who claim under, or in the right of parties. There is no such privity between a surety and his principal, as will take him out of the general rule. The authorities relied upon on this point, by counsel for defendant in error, are 1 *McCord R.* 379, and 3 *McCord R.* 225. Upon an examination, I find that the first of these cases only establishes the position, that a judgment against an administrator is conclusive against him, in an action founded on that judgment, suggesting a *devastavit*. The rights of sureties were in no way involved in that case. The other case, in 3 *McCord*, I state, on the authority of Chancellor Harper, only decided, that, although the surety had not been summoned before the Ordinary, the decree against the principal was *prima facie* evidence against him. The case of *Cureton vs. Shelton*, (3 *McCord R.* 412,) has been more generally relied upon, in South Carolina, than any other, to sustain the position that the decree is conclusive. But see the view taken of this case by Chancellor Harper, in the *Ordinary vs. Condy*.

By the act of the Legislature, passed in 1805, (*Prin. Dig.* 237,) whenever securities to executors, administrators, or guardians, conceive themselves to be in danger of suffering thereby, and petition the Court of Ordinary for relief, the said court shall cause the executor, administrator, or guardian, to be summoned to appear before them, at the next sitting thereof; and shall make such order, and give such relief in the case, by counter-security, or otherwise, as to said court shall seem just and equitable. Under this act, Jesse Pye, the surety of Bryant, applied to, and was discharged by the Court of Ordinary of Putnam county. That court passed, at the same time, an order revoking the letters of Bryant, the guardian, unless, on or before the next term of said court, he shall give new bond and security. Whether the new bond was given or not, the record does not inform us.

It is not questioned, that, in this act, the Legislature clothed the Court of Ordinary with power to discharge the surety to a guardian's bond; they are authorized by the act to give relief to the surety, by counter-security, or otherwise, as to them shall seem just and equitable.

The law presumes that they will give relief in such way as will not injure the ward; it is their duty to protect the rights of the ward. This they can do in several ways; they can discharge the surety, taking new security for the further execution of the trust; or they can require the guardian to settle with a new guardian, before granting a discharge. In case they do, however, as they did in this case, discharge the security, by their judgment, from what is he released? We think, only from future liability. So far as he is fixed with liability, at the time of the discharge, *that* continues. No power on earth can release him from existing liability. If new security is given, the new surety is bound for the future management of the trust, and also bound equally with the old sureties, for past management of the trust. In South Carolina, where there is a statute almost identical with our act of 1805, there may be found *dicta*, denying the power of the Court of Ordinary, or of Chancery, to dissolve the contract of suretyship, as to future liability. The decisions of the courts have, however, recognized the power; and determined the effect of a discharge to be as we have just stated it.—2 *Bailey's R.* 480; 2 *McCord*—

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C. R. 55; 1 *Hill's Ch. R.* 414. See *Woods vs. Vason*, determined by this court, *ante*, p. 84.

As the record of the Ordinary in this case, does not show that new bond and security was given, in pursuance of the order *nisi*, we infer that none was given, and that the guardianship was revoked. We have seen that, generally, in cases where there is no discharge of the sureties, a judgment or decree against the guardian, is *prima facie* evidence of a *devastavit* in an action against them on their bond. In this case, the surety was discharged in June, 1833, and the decree against the guardian was rendered in 1838, about five years thereafter. We are now to inquire, what evidence does this decree, and the execution issued upon it, with a return of *nulla bona*, furnish of a *devastavit*, so as to charge the sureties? The decree is evidence of waste by the guardian, and the return of *nulla bona*, on the *fi. fa.*, is evidence of insolvency. But at what time do the decree and the *fi. fa.* establish the *devastavit*? At the date of the decree, five years after the surety was discharged.

* Does the decree, then, prove anything against the surety? By itself, we answer, nothing; because he is liable only for the waste committed before his discharge. We are not prepared to say, that a state of facts might not exist, which would make this decree evidence of waste, committed anterior to the discharge. If there are also, in evidence, facts or circumstances which directly, or inferentially, connect the waste established by the decree, with any maladministration, before the discharge of the surety, it ought to be sent to the jury, and the amount of its evidence weighed by them. For example, we are not prepared to say, that the marriage or maturity of the ward, before the discharge, (being, in that case, a person capable of settling with the guardian, and of giving an acquittance,) together with the subsequent decree, in favor of the ward, would not establish a *devastavit* before the discharge, and make the surety liable.

For myself, I believe there is no doubt of it. The fact of the guardian's having received the effects of the ward before the release of the surety, together with the decree rendered after the release, do not, together, make out a *devastavit*; for the reason, as we hope to show, that the receipts of the effects alone, before the release, is no evidence whatever of maladministration. The decree cannot, in this case, relate back to the time of the receipt of the effects, as held by the presiding judge. If, as we hold, the discharged surety is only liable for maladministration before his release, that is a *fact* which the plaintiffs must prove, either directly or circumstantially.

A relation, *in fact*, may be established between the decree and the receipt of the effects. In this case, in our judgment, that *legal relation*, which is a fiction, does not exist. This fiction is adopted in certain cases, where justice requires a resort to it; it is founded in necessity, *ut res magis valeat quam pereat*. For example, if a *feme sole* makes a deed, and it is delivered as an *escrow*, and marries before it is delivered to the grantee, its delivery to the grantee relates back to the first delivery. The marriage, intervening the first and second delivery, is the necessity which creates the relation. The doctrine of relation, thus explained, cannot obtain here; in this case, the rules of evidence, and the rights of the surety, cannot, without violence, be made to yield to a legal fiction.

The right of the plaintiffs to recover here, depends upon an affirmative
to wit: a waste by the guardian, before the release of the surety.

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The law of pleading and the rules of evidence cast the *onus* upon them. As to the law of relation, see *Kent's Com.* vol. 4, p. 454; 1 *Johns. Ch. R.* 297; *Perkin's*, sec. 138; 3 *Coke*, 35, b, 36, a; 3 *B. and C.* 317.

It was held by the able judge who presided on the trial of this cause, "that no other evidence of waste by the guardian was necessary, on the part of the plaintiffs, to charge the surety, than the reception of the effects of the ward by the guardian, before the discharge of the surety; provided he had failed to pay over and account for the same." This question has often been before the courts of South Carolina; and notwithstanding the acknowledged learning of her judges, it is not a very easy matter to determine, from the books, how it is settled in that State. There are decisions, in fact, on both sides. I shall not undertake an analysis of them, because this has been undertaken already, by this court, in *Woods and Vason*. We differ with the court below, and hold, that the reception of the effects of the ward, unaccounted for, is not, *per se*, waste.

The condition of the guardian's bond is, that the guardian do well and truly *demean himself*, as guardian, agreeably to his *letters* of guardianship, and agreeably to *law*. Under his contract with the Court of Ordinary, the surety undertakes that his principal will *demean himself*, (that is, execute his trust,) *agreeably* to the instructions contained in his letters of guardianship, and *agreeably to law*. Now, we assume that any one, feeling aggrieved, and seeking redress out of the surety upon his bond, is held to show a breach of the bond; that is to say, he is held to show that the guardian has not demeaned himself agreeably to his letters of guardianship and agreeably to law. One of the directions which the Ordinary gives to the guardian, in his letters, is, "that you inquire into and take charge of his (the ward's) estate." By the commission, then, under which he acts, it is made his duty to "inquire into and take charge of his ward's estate;" that is, to do that, the doing of which is sought to be made, in this cause, a *devastavit*. The requirements of the bond are in exact accordance with the instructions of the letters; a part of the condition of the bond is, that the guardian *demean himself* agreeably to his letters of guardianship. We are aware that the instructions of the letters are in subordination to the law. But the instructions of the letters, in this particular, are but the requirements of the law. The law also makes it his duty to inquire into and take charge of the estate of his ward; to *receive* and *keep* his effects. Nay, further, if he fails to do this, he is guilty of *devastavit*, which will forfeit the condition of his bond, and charge his sureties.

It is his duty, we say, to collect in, and take charge of, the effects of his ward; the duties of guardian and executor, in this regard, are the same. This will not be controverted. Indeed, if the guardian is not appointed for this purpose, then the appointment of a guardian at all, for the management of the estate of a minor, is an act of redeemless folly.—*Williams' Ex'rs* 718, 719. If an executor or administrator unduly delay to bring an action, until it is barred by the statute of limitations, he becomes personally liable, (*Williams' Ex'rs* 718; 12 *Mod.* 573,) and such delay will amount to a *devastavit*.—*Williams' Ex'rs* 1284; 12 *Mod.* 573.

By the laws of Georgia, guardians are required to make an inventory of the effects of their wards, and return it to the Court of Ordinary. Moreover, the statute (12 *Char.* 2) makes it the duty of guardi-

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the custody, tuition and management of the goods, chattels and personal estate of children committed to their care. This statute is of force in Georgia.—*Schley's Dig.* 243.

We think, then, it is established by these views, and the authorities which sustain them, that it is the duty of the guardian to receive the effects of the ward, and if he fails to collect and receive them, he commits waste. If these things are so, can the receipt of the effects be evidence of waste at the same time? The thing is not only unreasonable, but absurd. But it is said, that it is not the receipt, *per se*, of effects which will charge this surety, but not accounting and paying over, up to the time of the discharge, will charge him. In other words, the plaintiff in the action on the bond, having shown that effects came to the hands of the guardian, before the release of the surety, he will be chargeable, unless he can show that they have been paid over, thus shifting the onus. But if, as we trust has been demonstrated, the mere receipt of effects is in no sense waste, then the plaintiffs have, at the time when they claim that the onus is shifted, established no waste. They have shown no breach of the bond; and this, we contend, is to be affirmatively proven by the plaintiffs. Now, the keeping the effects, or having them on hand at the time of the release, is no breach; for it is as much the duty of the guardian to keep the effects as to receive them, *unless*—and here lies the true distinction in these cases—he keeps the effects, or holds them at the time the surety is discharged, under circumstances which amount to a dereliction of duty; under circumstances which show a violation of his trust. These circumstances, we hold, it is incumbent upon the plaintiffs to prove; they must show a breach of the bond. It would be impossible to say what would be a safe general rule upon this subject. We undertake to establish none. Each case must be, in some degree, controlled by the circumstances which attend it.

We will say, however, that in cases where the receipt of effects by the guardian is proven, and a demand is made for a settlement, anterior to the discharge of the surety, by any person entitled to receive and receipt for such effects, the surety will be liable. To this extent go the following cases: *Vaughan vs. Evans*, 1 *Hill's Ch. Rep.* 414; *Townsend and Gordon vs. Everett*, 6 *Ala. Rep. N. S.* 607; *the Governor vs. Robins*, 7 *Ala. R. N. S.* 79; *the Ex'ors. of Moore vs. the Treasurer*, 1 *Nott and McCord*, 214; *Wright vs. Hamilton*, 2 *Bailey*, 51.

Any act of maladministration, before the release—such as a use of the effects for private purposes, investment of funds contrary to law, gross neglect in the management of the ward's estate—would, of course, charge the surety. Insolvency anterior to the release would charge the surety; we are inclined to the opinion that slight evidence of waste will be sufficient to charge him.

And, as before intimated, I should hold, that if the ward has married, or attained to maturity, before the discharge, proof of the fact would be sufficient, in the first instance, for the plaintiffs. For whilst it is the duty of the guardian to receive the effects of his ward, and to keep them, it is his duty to keep them only until his ward is legally entitled to receive them: proof that there are persons *in esse* before the discharge, capable, in law, of giving the guardian an acquittance, ought, it appears to me, to surmount the objection to the receipt of effects by the guardian, and to shift the onus upon showing that he had paid over the effects to such

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persons, or otherwise relieving, against the presumption of a devastavit. It is true, however, that the case of *Vaughan vs. Evans*, and other cases, under such circumstances, make a demand necessary. It only remains to apply these principles to the case at bar. Up to the time of Jesse Pye's discharge, and long afterwards, by the Ordinary of Putnam county, the ward of his principal, Orra Ann Weathers, was unmarried and under age; no acts of waste were proven before that discharge; before that time there was no person *in esse* authorized to make a demand, nor does it appear from the record but that, at the date of the discharge, the guardian was solvent. The only evidence of waste, disclosed by the record, is the receipt of effects, before the discharge of the surety, by the guardian, and the decree rendered against the guardian, some five years thereafter, with the return on the execution issued on the decree of "*nulla bona*." It is, therefore, the judgment of this court, that the presiding judge erred in refusing the rule for a new trial on the 4th, 5th and 6th grounds.

The 7th ground insisted upon for a new trial is, that the breaches assigned in the plaintiff's writ are anterior to the discharge, and there is no evidence to prove them but the record of a decree upon a suit instituted long after the discharge; that is to say, as we understand this specification, the *allegata* and the *probata* do not correspond. In discussing the previous assignments of error, we have laid down principles which govern this. If, as we have argued, the decree in this case is of itself no evidence of waste, the doctrine of relation not applying; and if, as we hold, the receipt and keeping the effects before the discharge by the guardian are not evidence, under the circumstances of this case, of waste; then, it is true, there is no proof of the breaches alleged, anterior to the discharge; and the proof does not sustain the allegations of the writ, and there ought not to have been a verdict for the plaintiffs.

The eighth error complained of is, that the court rejected the testimony of a witness, who was offered by the defendant to prove that Bryant, the guardian, was solvent subsequent to the discharge of the security. The court below having admitted the execution against Bryant, with the entry of *nulla bona*, to prove his insolvency, we think this testimony ought to have been admitted in rebuttal.

The ninth ground, to wit, that the verdict was contrary to both law and evidence, is added, as we suppose, as an expletive, to round off the body of the defendant's complainings, and needs, in this case, no very special notice.

We therefore reverse the decisions of the court below, upon all the grounds taken on the rule for a new trial, except the second.

No. 58.—HARRISON McLAREN, plaintiff in error, vs. JOHN P. STEAPP, defendant in error.

In all cases of account, where the remedy of the plaintiff would not be as *adequate and complete* in a court of law, as in a court of equity, either from the *defect of proof*, or other impediment, or for the purpose of avoiding a *multiplicity of suits*, the jurisdiction of the latter court attaches.

If it is necessary for the plaintiff to search the conscience of the defendant, in order to establish his account, he may go into a court of equity for the discovery, in the first instance, and the court will not only give him the discovery, but will (on a proper prayer for the purpose) proceed to decree to him the appropriate relief consequent upon that discovery.

Where there is a general demurrer to the whole bill filed for discovery and relief, and the plaintiff is entitled to an answer to any part of the bill, the demurrer will be overruled.

A court of equity will decree a defendant to account for money overpaid, in pursuance of a usurious contract.

This was a suit in equity, brought by the defendant in error against the plaintiff in error, returnable to the April Term, 1846, of the Superior Court of the county of Campbell, the object of which was to recover back usury alleged to have been paid by the complainant to the defendant in the bill. The bill alleged, that in the year 1838 the complainant borrowed from the defendant in the bill the sum of seventy-six dollars and twenty-five cents, or other amount not precisely known by the complainant; that the debt thus contracted was annually renewed, until, in the year 1843, at exorbitant usury, sometimes at 16 and at other times 20 per cent., the precise amounts of usury agreed on at each renewal not known to the complainant, and for which various notes were given at different times, and due at different periods; but that the whole amount of usury received by the defendant in the bill, amounted to one thousand dollars or other large sum. That in the year last aforesaid, the complainant in the bill fully paid off and discharged the whole of said usury, without and before any judgment. That the complainant did not know the amount due him as the excess of usury over and above the principal sum lent, and the legal interest thereon; and that he had no way or means of establishing the same by evidence, without resorting to the conscience of the defendant in the bill; and the bill concluded with a prayer for discovery, account and relief, &c.

To which bill a general demurrer was filed, denying the right of the complainant to any discovery or relief therein prayed, alleging that the complainant had an adequate remedy at law; that no action at law being pending, the complainant was not entitled to a discovery; and that, taking the charges in the bill to be true, there was no matter in the bill upon which any decree for the complainant could be founded.

The bill came on to be heard upon the demurrer at the said term before Judge Hill; whereupon, after argument had, the demurrer was overruled, and the defendant in the bill ordered to answer. To which the counsel for the defendant in the bill excepted.

The error assigned, see the decision of the Supreme Court.

T. A. LATHAM, for the plaintiff in error.

WILLIAM EZZARD, for the defendant in error, relied on the following grounds :

1st The court of equity having obtained jurisdiction, for the purpose of discovery, will retain it for all purposes.

2d. If a bill for discovery and relief be good as to the discovery, a general demurrer to the whole bill is bad.—4 *John. Ch. Rep.* 294.

3d. The bill prays an account as to the usurious transactions, and account itself forms a separate ground of equity jurisdiction. And a bill of this sort is not confined to cases of mutual accounts, but may be maintained where there have been a series of demands on one side, and of payments on the other.—*Cooper's Eq. Pl.* 134.

By the Court.—WARNER, Judge.

This case comes before the court on a writ of error, from the county of Campbell, alleging error on the part of the court below, in not sustaining a general demurrer to a bill in equity, filed by the defendant in error, against the plaintiff in error, for discovery and relief. The complainant in the bill seeks a discovery from the defendant in relation to various *usurious* transactions, which it is alleged took place between the parties, from the year 1838 up to the year 1843, whereby the defendant received from the complainant the sum of one thousand dollars, or other large sum, and also prays an account of the money so received by way of usurious interest by the defendant, and that he may be decreed to pay the same to the complainant. It is also charged, in the complainant's bill, that various notes were given by the complainant, to the defendant, due at different times, and drawing different rates of interest ; that the whole of the usurious interest was paid without any judgment being obtained against him therefor ; that he does not know the excess of usury due him from the defendant, over and above the principal and lawful interest ; and that he has no way or means of establishing the same by evidence, without resorting to the conscience of the defendant. The defendant demurs to the complainant's bill generally, for want of equity, and that he had an adequate common-law remedy. There are several assignments of errors, but they may all be embraced, and disposed of together. The defendant insists, that as an action at law would lie, to recover back the usury from him, this court has no jurisdiction ; and if this court had jurisdiction, for the purpose of obtaining a discovery from the defendant, it can be obtained for the purpose only of aiding a suit in a court of common law. The argument for the plaintiff in error is, that the complainant below should have instituted his suit in the common-law court, to recover back the usury ; and then come into this court for the discovery, in aid of that suit. This is a bill for discovery and account. Account is one of the ancient heads of equity jurisdiction.—1 *Madd. Ch.* 23. Courts of equity, as well as courts of law, have *concurrent* jurisdiction in cases of accounts.—1 *Madd. Ch.* 85 ; *Cooper's Eq.*, under head of *Jurisdiction*, 29 ; 1 *Story's Equity*, 423-4, sections 441, 442 ; *ib.* 438, sections 457, 458. We do not intend to be understood as establishing the rule, that a plaintiff may

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go into equity to recover every demand which he may have founded on account, where he has a plain and *adequate* remedy at law; but that a court of equity has concurrent jurisdiction, with courts of law, in matters of account, where there is *doubt* or *difficulty* as to his right to recover in a court of law. In all cases of account, where the remedy of the plaintiff would not be as *adequate* and *complete* in a court of law, as in a court of equity, either from the *defect of proof*, or other impediment, or for the purpose of avoiding a *multiplicity of suits*, the jurisdiction of the latter court attaches. Indeed, if it is necessary for the plaintiff to search the conscience of the defendant, in order to establish his account, he may come into a court of equity for the discovery in the first instance, and the court will not only give him the discovery, but will (on a proper prayer for that purpose) proceed to decree to him the appropriate relief consequent upon that discovery. 1 *Madd. Ch.* 85; *Cooper's Eq. under head of Jurisdiction*, 30, 31; 1 *Story's Eq.* 81-87, sections 64-71; *ib.* 437-8-9, sections 456, 457, 458; *Carlisle vs. Wilson*, 13 *Ves.* 276; *Post vs. Kimberley*, 9 *John. Rep.* 470; *Rathbone vs. Warren*, 10 *John. Rep.* 605; *King vs. Baldwin*, 17 *John. Rep.* 388; *Hawley vs. Cramer*, 4 *Cowen's Rep.* 727; *Russell vs. Clark's Ex'rs*, 7 *Cranch*, 69.

In this case, the complainant alleges, there have been, during several years, various renewals of notes, different usurious contracts made with the defendant, which necessarily renders the account sought, intricate and complicated, and that he cannot prove these *usurious* transactions without a discovery thereof by the defendant. That the complainant is entitled to the discovery, there can be no doubt; and the court having jurisdiction of the cause for that purpose, ought, both on principle and authority, to retain it, and decree the appropriate relief, consequent upon such discovery; or, as was said by the court in *Russell vs. Clark's Ex'rs*: "If certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom the claim is asserted, he may be required, in a court of chancery, to disclose those facts; and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy." Besides, the demurrer in this case went to the whole bill; and the rule is, "where there is a general demurrer to the whole bill, filed for discovery and relief, and the plaintiff is entitled to an answer to any part of the bill, the demurrer will be overruled."—*Kimberley vs. Sells*, 3 *John. Ch. Rep.* 467. In *Dey vs. Dunham*, (2 *John. Ch. Rep.* 191,) it is said: "There is no doubt that a court of chancery will order a defendant to account for money, overpaid, in pursuance of a *usurious* contract." The reason why a court of chancery, in this State, should grant the relief, consequent upon a bill of discovery in cases like the present, is greatly strengthened by the consideration, that all equity causes are tried by a jury, under the direction and supervision of the chancellor, and which would be as competent to settle matters of account as a common-law jury.

We are therefore of the opinion there is no error in the record; and that the judgment of the court below must be affirmed.

No. 59.—JOHN DOE ex dem. WILLIAM D. CONYERS, adm'r. of ANDREW SMITH, deceased, vs. RICHARD ROE, casual ejector, RICHARD KENNON and ADDISON KENNON, tenants in possession.

Against the right of action to recover the property of an intestate, the statute of limitations will not commence to run until administration of his estate has been granted.

By the Court—LUMPKIN, Judge.

This was an action of ejectment, tried at March Term, 1846, of Newton Superior Court, before Judge Merriwether, to which the defendant pleaded the statute of limitations. The plaintiff introduced and read in evidence a grant from the State of Georgia, to his intestate, Andrew Smith, of letters of administration to himself, on the estate of Smith, bearing date in 1838; and having proved possession of the premises in dispute by the defendants, at the time he sued out his writ, closed his case. The defendants, in support of their plea, offered a deed to the land from Charles Kennon to Richard Kennon, dated in 1836, and proved that the defendants had continued in peaceable occupancy thereof, from that period to the time of the trial. They also exhibited conveyances from various persons, purporting to be the heirs at law of Andrew Smith, the grantee, to one Anderson.

The plaintiff, in rebuttal, had the testimony of Thomas King taken by commission, who swore that Andrew Smith died in 1829 or 1830, and the case having been submitted upon this statement of facts, the court charged the jury, "That if the defendants had been in possession of the premises for more than seven years, under the deed from Kennon, they were protected under the statute of limitations, although the drawer of the lot was dead, and no administration was taken on his estate, till within seven years of the commencement of the action." To this opinion the plaintiff excepted; and the propriety of that charge is the question now presented for our decision.

Whether *heirs at law* can maintain ejectment for land in this State, has long been a debatable point with the profession. That the *administrator* can sell, has never been seriously doubted by the courts. It would be strange if it were, seeing that real and personal estate are both placed by our law upon the same footing, and constitute assets in the administrator's hands; first, for the payment of the debts of the intestate, and then for distribution of the surplus among the next of kin and distributees. And to effectuate these ends, the administrator is clothed with authority, under the sanction of the Ordinary, to sell and convey to purchasers *legal* title to the *real*, as well as personal, estate of his intestate. Against a suit at the instance of the representative, can the statute commence to run, until the right is vested in the representative to maintain an action? The court thinks not. It is the grant of administration which gives the right to sue, and the plaintiff's letters are a part of his title.

We fully appreciate the justice and policy of statutes of limitation. It has been truly said, that there are none, whose operation is so wide, so beneficial, and so peaceful. They well deserve the high appellation bestowed upon them by the civil law, *saluberrima lex*; and I am not

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but that the wisdom of the Athenians is worthy of imitation; in prescribing a certain limit as the *ne plus ultra*, at the expiration of which, a party should be exempt from all legal harassment. The public repose would be an ample apology for such a sweeping exaction from all the world.

The doctrine is, that where the statute begins to run, its operation is not arrested, even where there is a legal impossibility to assert the right.—*Livingston vs. Robin*, 15 *Johns. Rep.* 169; *Celdon vs. Moore*, 13 *Johns. Rep.* 514; *Marsteller vs. McLean*, 7 *Cranch*, 156. But where there is no one *in esse* to assert the rights of the intestate, they cannot of course be presumed to be taken away by any supposed acquiescence in the adverse possession of the defendant.—4 *Mod.* 376; *Carth.* 335; *Skinner*, 535; 3 *Hill's Rep.* 346. Where money of a person who had died intestate had been received by the defendant before administration was granted—it was held that the statute of limitation should not begin to run from the time of receiving the money; for then no one had a title to receive it; but it should begin from the time of administration granted.—*Curry vs. Stephenson*, 2 *Salk.* 421. Lord Bacon, in commenting upon this authority, says: "Had the money been received in the lifetime of the person who died intestate, that person would have had a right of action vested in him, and from that period the time of limitation would have commenced, and the statute would have been a bar. For when once the time of limitation has begun to run, it suffers no interruption from the death of the claimant; nor does it revive in favor of any person upon whom the right of claim may devolve. In *Hickman against Walker*, where the statute of limitations was pleaded to an action brought by an executor on a promise made to his testator, the court ruled that the six years should be computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will.—*Willes*, 27.

This distinction, so clearly established by reference to the authorities, would not have been deemed necessary, but for the respect so deservedly entertained for the able and acute judge, who pronounced the opinion we are combatting.

It is contended, however, that our own statute has settled this question.—*Prin. Dig.* 513. It enacts that the action of ejectment shall be brought within seven years after the cause of action accrues, and that the right of entry shall be taken away after that time, unless the person entitled to sue, shall, at the time the right accrues, be within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned. The inference and argument is, that inasmuch as executors and administrators are not embraced in the *saving clause*, as it is called, that the statute runs of course against them. But our answer is, that the statute itself, in *totidem verbis*, allows the representative seven years to bring ejectment, *as his right, as such*, does not accrue until he is qualified. There can be no cause of action until the person in possession withholds the premises from the real owner. It would be judicious, perhaps, for the General Assembly to limit the time, within which representatives should sue, *after obtaining letters*. But the law gives the party seven years, nor can this court allow less, until commanded to do so by the supreme power in the State. Our statute of limitations is, with some few alterations, copied from the English statutes of 21 *Jac.* 1, ch. 16, and 32 *Henry* 8, ch. 2, which is *in pari materia*—and the only difference upon the subject immediately under con-

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sideration is, that seven years are substituted for twenty. We leave the matter to be disposed of by those whose duty it is to declare, not what the law is, but what it shall be. Believing, however, as we do, with Lord Holt, that the statute of limitations is one of the best of statutes, (7 *Modern*, 12,) and, with Mr. Justice Wilmot, that it is a noble, beneficial act, (1 *Black. R.* 187,) we are not prepared to say, that a former administration would not be presumed, after the lapse of a great length of time, in order to protect the title of the occupant. Courts in our sister States have intimated such a purpose. Even grants are presumed for the purpose of quieting ancient possessions. Moreover, we are not quite clear, that chancery would not grant a perpetual injunction, notwithstanding its reluctance to restrain legal rights, in a case where the *heirs at law* have conveyed, or are barred, and *there are no creditors*.

Judgment reversed.

WILLIAM W. CLARK, for the plaintiff in error.

ANGUS M. D. KING and ——— JONES, for the defendants in error.

No. 60.—JOHN LIPTROT, administrator of CAMILLA TALTON, plaintiff in error, vs. JAMES HOLMES, defendant in error.

To enable a plaintiff to maintain *trover*, he must have either a general or special property in the chattel: the actual possession, or the right of possession.

The whole interest of an intestate's personal estate vests in his administrator, on the grant of letters of administration; and such grant has relation to the time of the intestate's death.

The action of *trover* being founded on a conjunct right of property and possession, any act of the defendant which negatives, or is inconsistent with, such right, amounts, in law, to a conversion.

On the death of a *feine covert*, intestate, her separate estate vests in her legal representative; and he can maintain *trover* therefor, even where there has been a trustee appointed, for the sole purpose of protecting such property against the marital rights of the husband, during the coverture; the trust being considered as *executed* whenever the coverture ceases to exist. The interest of the trustee in the property is determined by the coverture, when there is no other object to be accomplished by his appointment.

This was an action of trover and conversion, tried before Judge Floyd, in the Superior Court of the county of Houston, on the appeal, at April Term, 1846. The suit was brought by the plaintiff in error against the defendant in error for the recovery of damages for the alleged conversion of fourteen slaves.

The defendant in error pleaded the general issue, and also a special plea, alleging, that if the slaves sued for were the separate and trust property of the plaintiff's intestate, in her lifetime, the same slaves were reduced to possession by Henry Talton, the husband of said Camilla Talton, the plaintiff's intestate; and that the said Henry Talton being

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in the possession of said slaves before and at the time of the death of said Camilla, afterwards departed this life so possessed, and so in the enjoyment thereof. And the defendant in error, and Narcissa J. Talton, the widow of said Henry, obtained letters of administration on the estate of said Henry; and, as such administrator and administratrix, they received said slaves into their possession, and held and claimed them as such administrator and administratrix, as a part of the estate of said Henry.

Upon the trial, it was proved, by witnesses introduced in behalf of the plaintiff, that the slaves mentioned and described in said case were inherited by the said Camilla, the plaintiff's intestate, partly from the estate of Hopkins Liptrot, her former husband, and partly from the estate of Aquilla Liptrot, her father; that Henry Talton intermarried with said Camilla, and survived her, and afterwards married again, and died. Camilla left two children: one by her former husband, and the other by the said Henry. The demand of the slaves, and the refusal of the defendant to deliver them, and his possession before and after the commencement of the suit, and that he treated them as his own, together with their value, and the value of their hire, was proven. The plaintiff in error then introduced his letters of administration on the estate of said Camilla, and also a marriage contract between said Camilla and Henry, and John Liptrot, as trustee, (a copy of which marriage contract is attached,*) which were read in evidence to the jury by the plaintiff in error. The plaintiff then proved the intermarriage of said Henry and Camilla, in pursuance of said marriage contract, and closed his case.

** The Marriage Contract referred to.*

GEORGIA, } Articles of agreement of three parts, indented, made, and
Houston county. } executed, this the twenty-ninth day of May, in the year one
thousand eight hundred and thirty-four, between Henry Talton, of the county and
State aforesaid, of the first part; Camilla Liptrot (widow of Hopkins Liptrot, deceased,) of the said State and county, of the second part; and John Liptrot, of the
said State and county, of the third part: Witnesseth, that whereas the said Camilla
Liptrot, as the widow of said Hopkins Liptrot, deceased, is entitled to, and vested
with, one half of the estate, both real and personal, of the said deceased, and as the
daughter of Aquilla Liptrot, of the county of Washington and State aforesaid, the
said Camilla will be entitled to and receive other property, both real and personal:
And whereas, a marriage is this day intended to be had and solemnized between the
said Henry Talton and Camilla Liptrot, with whom the said Henry is to have and
receive the sum of one hundred dollars in money, as for her marriage portion; and
the said Camilla Liptrot being desirous of enjoying, maintaining, and keeping, all and
singular the lands, negroes and other property, real and personal, which shall be as-
signed to her, on distribution of the estate of said Hopkins Liptrot, deceased, and
also all and singular the property, real and personal, that shall be given to her,
the said Camilla, by her said father, Aquilla Liptrot, and also which shall be received
by her from her said father's estate, after his death, in case she should then be living,
and the increase of said property, separate and distinct from all such property, real
and personal, as shall be acquired, claimed or owned, or which is now claimed or
owned, by the said Henry Talton, her intended husband, in the event of their inter-
marriage aforesaid. And the said Camilla Liptrot being further desirous, that all and
singular the said property and increase thereof, when assigned, or delivered to, or
received by her, as herein-before contemplated, shall be kept and assured to her sepa-
rate use and enjoyment forever. And the said Henry Talton hereby assenting and
agreeing thereto, in consideration of the marriage portion aforesaid, and of the said

Whereupon the defendant's counsel, without introducing any evidence in support of his plea, moved the court for a nonsuit, on the ground that the legal estate was in said John Liptrot, as trustee, and not as administrator, of said Camilla.

And, secondly, if the plaintiff had any remedy, it was in equity, and not in a court of law.

Which motion the court below sustained, and held, that an administrator took no other title than his intestate had, and stood in the same condition. Plaintiff sued as administrator of Camilla Talton, deceased; and, to prove title, showed a paper, which purported to be articles of agreement made and entered into between said Camilla, then a single woman, Henry Talton, and John Liptrot, in contemplation of a marriage about to be solemnized between said Camilla and Henry, for the purpose of securing to Camilla the enjoyment of her property, free from all control of her future husband, and from all liability to his debts. To effect this object, the property of the said Camilla, by the said deed of agreement, was conveyed to the said John Liptrot, in trust, for the said Camilla; and, by the same deed, the said John Liptrot accepted the trust. The marriage was solemnized between the said Camilla and Henry. The property mentioned in the deed was received, and held, and controlled according to its provisions, during the life of Camilla. She died, leaving a child by said marriage, her husband surviving her. Henry Talton died, in the possession of the property, leaving the child of Camilla by said marriage surviving him. John Liptrot took let-

intended marriage: It is therefore covenanted and agreed, by and between the parties to these presents, in manner and form following; that is to say, the said Henry Talton and Camilla Liptrot have made, constituted and appointed, and by these presents do make, constitute and appoint, the said John Liptrot trustee for the said Camilla, and for all and singular her property, real and personal, herein-before referred to, and of the increase thereof, to keep, preserve, and assure the same forever, unto the said Camilla, and to her entire and free use, control and benefit, free and exempt from all and every liability, obligation, or charge of any and all judgments, debts, demands, or contracts, now existing, or which shall hereafter exist, against him, the said Henry Talton. And the said John Liptrot hereby accepts the trust aforesaid, and covenants and agrees to and with the said Camilla, that he, the said John Liptrot, will well and truly take charge of, have, hold, and keep and defend in her possession, and for her separate and distinct use as aforesaid, all and singular the said property, personal and real, and for the exclusive use and benefit of the said Camilla: And that he, the said John Liptrot, will well and truly, and in all things, do and perform all and singular the duties of trustee as aforesaid. And the said Henry Talton covenants and agrees to and with the said Camilla and John Liptrot, that he, the said Henry Talton, will not oppose or obstruct the said John Liptrot, in the due and proper execution of his trust aforesaid, but will render him all necessary aid and assistance in the execution of the same, for and in behalf of the said Camilla.

And for the full, faithful and perfect performance of every part of this agreement, the said Henry, Camilla and John have paid each to the other, the sum of five dollars, in addition to the consideration before expressed, which sum they hereby acknowledge to have received. In witness whereof, they have hereto set their hands and seals, the day and year above written.

Signed, sealed and
delivered, in presence of
James M. Kelly,
Edwin Moulger, J. I. C.

}

HENRY TALTON, [L. S.]
her
CAMILLA X LIPTROT, [L. S.]
mark.
JOHN LIPTROT, [L. S.]

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ters of administration upon the estate of Camilla Talton, deceased, and brought the suit; and to show, and prove, title, exhibits this deed.

Camilla Talton, the plaintiff's intestate, at the time of her death, had only an equitable interest in the property; and such interests are cognizable alone in a court of equity. The legal title remains in the trustee, and he alone could sue, and recover, at law; and the court, therefore, awarded the nonsuit. To which decision of the court below the plaintiff in error excepted.

1st. That the court erred in this, that it ruled only an equitable title vested in the plaintiff, as administrator of Camilla Talton.

2d. Because the court erred in ruling that any estate, or title, remained in the said John Liptrot, after the death of Camilla Talton, and grant of letters of administration to the plaintiff.

3d. Because the court erred in ruling that the legal title remained in the said trustee, after the grant of said letters.

4th. Because the court erred in ruling that the plaintiff could not recover said property in trover, at law, against a wrong-doer.

5th. Because the court ruled that the plaintiff's remedy was solely in equity, and not at law.

6th. Because the court erred in ruling that the plaintiff could bring an action at law, as trustee, under said contract.

Upon which exceptions the errors complained of were assigned.

SAMUEL T. BAILEY, for the plaintiff in error.

As this action is predicated on the deed of marriage settlement; or as, rather, plaintiff claims title through that deed; it becomes necessary to first inquire, What estate, or interest, was conveyed, or secured, by that deed, and to whom?

There is no ambiguity upon the deed. It first recites that, as Henry Talton and Camilla Liptrot intended marriage, and she had property in possession, and much more in expectancy, she was desirous to secure it against the debts and contracts of Talton; and that it should be "forever kept separate, and assured to her separate use and enjoyment." Therefore, to effect that clearly-expressed object, they do not anywhere, nor by any expression, convey any property, or title, or interest in the property, to Liptrot; but they say they have "made, constituted, and appointed John Liptrot trustee for the said Camilla, and for all and singular her property, real and personal, to keep, preserve, and assure the same forever unto" (not John Liptrot, but) "the said Camilla, and to her entire and free use, control, and benefit, free and exempt from all and every liability, obligation, or charge of any and all judgments, debts, demands, or contracts, now existing, or which shall hereafter exist, against the said Henry Talton." Here is all the right, title, or interest, which John Liptrot ever had, or acquired, by virtue of this deed. He has no other power than that of a special attorney, to guard and protect the property in Mrs. Talton; no title passed to him, nor was intended to pass. The deed assures the title to Mrs. Talton alone; to her sole and separate use and enjoyment forever. This the law allowed, in spite of Talton's creditors, because he never had any title to, or possession of, the property before marriage; so that it was

competent for him, before any title vested in him, to release and assure, to his intended wife, all her property, in possession or expectancy; and the title, to her, would have been good without any trustee. Equity would have held him a trustee for her. Had such a deed been made after marriage, creditors could have impeached it; because the title having been once in him, their rights would attach.

Clearly, then, Liptrot was a trustee without an interest. He held a bare office. His duty was, to protect Mrs. Talton and her property against her husband and his creditors; and, as Talton assented, such an office or agency was lawful and binding. He was to see that she held and enjoyed her property forever. Would not such an agent, or trustee, as they call him, present a singular spectacle in a court of justice, maintaining that he had a better title and right to hold said property, than Mrs. Talton, under this deed? Well, if Liptrot could not claim, nor hold possession against her, with how much less right has a stranger, like the defendant, to hold the property?

But, we maintain: 1st, that in those cases where title is conveyed to trustees, to the use of a *feme*, that the absolute legal title is in her, at all times, while she is *discovert*; that, whenever the coverture ceases, the title to the trustee ceases also. It is upon this principle, alone, that when separate property is given in trust, for a *feme sole*, with an express declaration that she shall not alienate, yet, if there is no limitation over in case of alienation, she may make a good title to the property.—11 *English Ch. Rep. Condensed*, 368; 17 *ib.*; 1 *ib.* 34; *ib.* 37; *ib.* 40; 6 *Eng. Ch. Rep. C.* 461.

Then, if Mrs. Talton had survived the coverture, clearly she would have the absolute title, even if Liptrot had any during coverture. Her administrator has all her rights.

That absolute title vests in trustees, in any case, is more fiction than fact or law; and since the old feudal system of uses has been virtually abolished, courts have been disposed to look to the substance, rather than the forms of law; hence, they have held that a *feme covert* may convey her separate property, without the consent of her trustee.—*Saunders on Uses and Trusts*, 344, 345; 9 *Ves.* 520; 1 *ib.* 189, note; 15 *ib.* 596, 604; 2 *Story, Eq. sec.* 1388; 2 *Kent*, 170.

Nor is a separate examination necessary.—13 *Ves.* 191.

Does not this show that there is such a property in her, as would authorize an action of *trover*, when the coverture is removed?

When a trust is created for a particular purpose, and that purpose fail, a trust results to the original owner, or the heir.—2 *Coke Lit.* 332, note C; 2 *Atk.* 150; 1 *Cruise Dig.* 475.

Devise to pay debts after the purpose is fulfilled, the surplus goes to the heir, or remainder-man.—2 *Coke Lit.* 332, note C; 2 *Ves. jr.* 271.

Under a power of appointment to *cestui que trust*, on failure to appoint, the trust results to the donor after end of life-estate.—1 *Dev. and Bat. Eq.* 215.

Devise to A, in trust for B at 21; but if B die before 21, without issue, then to A and her heirs forever. A dies before B attains 21; held, legal title vested in B, on A's death, and no title remained in the trustee.—4 *Paige R.* 403.

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If *cestui que trust* die, leaving personal property, and no kin, the property does not vest in the trustee, but escheats.—*Lewin on Trusts*, 294.

Trusts are mere bailments.—2 *Bailey's Rep.* 330.

No one denies that a bailee may maintain trover.

It may be laid down as a general rule, say the Court of King's Bench, in *Doe ex dem. Player vs. Nicholls*, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them, as long as the execution of the trust requires it, and no longer; and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it.—1 *Barn. & Cres.* 336; 8 *Eng. Com. Law Rep.* 92; 5 *East R.* 162; 1 *Barn. & Ald.* 530; 1 *Keen*, 34; 15 *Eng. Ch. R. Com.* 34; 3 *Beat.* 434; 9 *Paige R.* 110, 523.

We believe we have shown—1st, that there never was any title to the property in dispute in John Liptrot as trustee, but that it remained in Mrs. Talton, and on her death vested in her administrator.

2d. That if any title ever did vest in him as her trustee, it ended with the coverture, and vested in her administrator.

But we maintain further, that if Mrs. Talton were alive, she would have such an interest as would sustain trover—2 *Bailey's R.* 330.

Furthermore, we contend, that as Mrs. Talton was proved to have died in possession, a stranger and wrong-doer cannot set up title in a third person, as against her, without going further, and showing that he claims through such third person.—11 *Wend. R.* 54.

Although it is in proof that Talton was in possession of the property after his wife's death, yet it is also proven that he did not take out letters to her, but that the plaintiff did; hence, his possession was tortious, and not in right of his wife, for he is not her next of kin, and the only claim he has to her property, is by virtue of letters of administration: if he holds in any other right, he must answer to her legal administrator.—*Dudley's S. C. R. Eq.* 236; 4 *Dess. R.* 155; 1 *M'Cord Ch.* 514, 324; 2 *ib.* 170.

The husband, while in life, would have been entitled, according to late authorities, to administer on his wife's estate; but having died without, her next of kin were entitled.—1 *Williams' Ex.* 244.

As to who will be entitled to this property, on a legal distribution by the administrator, is a grave question, which cannot arise legally now. When it does properly come up for adjudication, we trust to be able to show, that the two orphan children of Mrs. Talton are entitled, and not Talton's creditors, by virtue of his marital rights.

If we believed there was any evidence that plaintiff ever had any title as trustee, and that it did not cease at the death of Mrs. Talton, we would proceed to show that such title was merely equitable, and that on his taking out letters to her, the legal and equitable titles were united in him, and of course he could sustain trover.

We most respectfully contend and believe, that we have pursued the only legal course; that if we had sued as trustee, we should have deserved to have been nonsuited.

WASHINGTON POZ, for the defendant in error, based his argument upon the following points and authorities:

1st. Camilla Talton, during her life, had only an equitable interest in

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the property secured by the marriage settlement, and could only assert her claim in a court of equity.—*Coke Lit.* 272, b; *Lewin on Trusts*, 9-15; *Willis on Trustees*, 51-55, 109-119; 10 *Law Library*.

2d. The administrator of Camilla Talton could have no other or greater interest than his intestate possessed, and as she had an equitable interest, he must have the same.—*Toller on Ex'rs*, 133, and note 1.

3d. In the action of trover in this case, the plaintiff suing as administrator, and never having had actual possession of the property sued for, he must resort to the proof of his title, and cannot recover upon a mere possessory right.—2 *Starkie on Evidence*, 832, 833. Consequently, the only evidence of his title, is the marriage settlement; and that shows a mere equitable title. Again: the defendant Holmes is not a mere wrongdoer, but holds the property sued for, as administrator of Henry Talton, deceased, who, surviving his wife, became entitled to her estate, and that even without administering.—*Prince's Dig.* 251, sec. 107; *ib.* 917, sec. 181; *Whitaker vs. Whitaker*, 6 *John. R.* 112; 1 *Peere Wms.* 378; *Squibb vs. Wynn*, 3 *Atkyns' Rep.* 527; *Elliot vs. Collier*, 7 *John. Ch. R.* 244. Lord Hardwicke holds, that in such a case the property vests in the husband, before administration granted.—*Elliot vs. Collier*, 3 *Atkyns*, 527.

4th. But admitting that Talton could not have perfected his title to his wife's estate without administering, yet the legal estate resided in John Liptrot as trustee, and the death of Camilla did not alter it.—*Lewin on Trusts*, 147, 148, 149; 24 *Law Lib.*; 1 *Shep. Touchstone*, 527, 528.

BAILEY, in reply.

The authorities referred to, by the opposing counsel, do not sustain his position. Trusts were not well understood in England, in early times: hence so many inaccurate expressions of the courts and bar. The ancient feudal doctrine of uses being abolished, simple trusts were resorted to, as in some sort to supply their place; and when applied to the complex system of conveyancing in England, touching the fee of real estate, it renders trusts there wholly different from anything known in practice here. But when applied to personal estate, or chattels real, the practice in both countries is the same; the absolute fee never vests in the trustee.

The questions raised, and decided in the reported cases, read by the counsel for the defendant in error, were wholly different to the one now at bar. The questions in these cases were, what right the husband had to his wife's property? Not how he should acquire or perfect those rights. They speak of the property vesting in him on her death, and say that it vests even without and before administration; but they nowhere say that this right is perfect until he takes it through an *administration*; his right then vests in possession. It is like saying, that on the death of an intestate, his property vests in his wife and children, and yet it does not vest legally in possession until administration. This is the doctrine sustained by the very cases read by the opposing counsel. In the case read from 6 *Johnson's Reports*, Spencer, Judge, says expressly, that he decides that case upon its equitable circumstances. The plaintiff was not the administrator of the wife; her husband, therefore, had a better right in equity than he; but he declares, that if letters of administration shon^d

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taken out to the wife, he would be entitled in law to reduce all her property to possession, and on a distribution, the rights of the husband would have to be vindicated. The case in Peere Williams, is to the same effect. None of the authorities sustain the doctrine, that an administration is unnecessary. When they speak of the husband's rights by survivorship, they mean his ultimate title; his rights through an administrator; whereas, if she had survived him, her property would have gone to her next of kin, and not to his. But where those learned judges speak of his being next of kin of his wife, they use an unguarded expression.

That administration is in all cases necessary, we refer to *Dudley's S. C. Eq. Rep.* 238; 4 *Dess. Eq. Rep.* 155; 1 *McCord's Eq.* 514, 324; 2 *ib.* 170.

By the Court—WARNER, Judge.

This was an action of trover, brought by the plaintiff in error, to recover the possession of fourteen slaves. It appeared in evidence at the trial, the negroes in controversy were the property of the plaintiff's intestate, before her intermarriage with Henry Talton. That, prior to the marriage with him, she entered into a marriage contract, by which the aforesaid property was secured to her *sole and separate use*. It also appears, from the record, Henry Talton survived his wife Camilla, the plaintiff's intestate, married again, and then died. The plaintiff's intestate left two children, one by her former husband and one by Henry Talton. The plaintiff then proved the conversion of the negroes by the defendant, their value, &c.; then read his letters of administration to the jury, the marriage contract, proved the marriage of the parties thereto, and closed his case. The defendant then moved the court for a nonsuit, on the ground the plaintiff's evidence showed the legal title to the property was in John Liptrot, as trustee, under the marriage contract, and not in said John Liptrot as the administrator of Camilla Talton. Which motion the court sustained, on the ground that the plaintiff's intestate, at the time of her death, had only an *equitable* interest in the property, and that such interests are cognizable alone in a court of equity. To this decision of the court below, the plaintiff excepted, and now assigns the same for error in this court. The plaintiff has made general specifications in his assignments of error, but they all amount to the same thing in substance, and will be all considered together. To enable the plaintiff to maintain trover for the property in dispute, he must have had either a general or special property therein, the actual possession, or the *right of possession*.—*Holcombe vs. Townsend*, 1 *Hill's So. Ca. Rep.* 399.

The whole interest of the intestate's personal estate vested in the plaintiff as her administrator, on the grant of letters of administration; and such grant has relation to the *time of the intestate's decease*.—*Toller's Executors*, 133. Was there such an interest then vested in the plaintiff, as the administrator of Camilla Talton, as would entitle him to maintain an action of trover against the defendant, who is a mere stranger, so far as the evidence shows? It is true, the defendant's plea exhibits him in a different capacity, but that is no part of the testimony. It is conceded that the plaintiff's intestate held this property in her own right. Anterior to her marriage with Henry Talton, the title to it was

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vested in her. What has she done, prior to her death, to pass that title out of her? The defendant in error insists, she conveyed the title to John Liptrot, as trustee, by the marriage contract, and so the court below seems to have thought; but we have bestowed the most careful attention upon that marriage contract, and have not been able to find any words therein, which can be construed so as to pass the title out of her, and vest the same in him as trustee. After reciting the desire of the said Camilla, to secure the property for *her sole and separate use, free from the control of said intended husband*, it is further stipulated in said contract, that "the said Henry Talton and Camilla Liptrot do, by these presents, constitute and appoint John Liptrot *trustee* for said Camilla, and for all and singular her property, real and personal, hereinbefore referred to, and the increase, to *keep, preserve, and assure the same forever unto the said Camilla*, and to her entire and free use, control and benefit, free and exempt from all and every liability, obligation or charge, of any and all judgments, debts, demands or contracts now existing, &c. : And the said John Liptrot hereby accepts the trust aforesaid, and covenants and agrees to and with the said Camilla, that he will well and truly take charge of, have, hold, and keep, and defend, in her possession, and for her separate and distinct use as aforesaid, all and singular the said property, personal and real, and for the exclusive use and benefit of the said Camilla; and that the said John Liptrot will well and truly, and in all things, do and perform all and singular the duties of trustee as aforesaid." The instrument, it will be perceived, appoints him *trustee*; but there are no words of *conveyance* used, to pass the title of the property from her to him, as such trustee. How far a court of equity would have carried out the intention of the parties, and enabled him to protect the property against the marital rights of the husband, it is not now necessary to decide. Conceding, however, there are words in the instrument, conveying to John Liptrot the legal title to the property, for the *purposes specified in the contract*, yet, at her death, the objects and purposes of the trust were *fully executed*. What were the objects and purposes of the trust? Why, to protect her in the free and separate control and enjoyment of the property, during her coverture with Henry Talton; and the moment the coverture was dissolved, by the death of either party, the objects of the trust, as well as the *intention* of the parties, was fully answered. Whatever opinions may have prevailed at one time, in regard to the right of a *feme covert*, to alienate and dispose of her separate property, it is now well settled, she has that right, without the intervention of trustees; for such power is *incident to such ownership*.—2 *Kent's Com.* 171; *Clancy's Husband and Wife*, 354-5; *Fettiplace vs. Gorges*, 1 *Ves. Jr.* 46; *Essex vs. Atkins*, 14 *Ves.* 542, 547; *Jacques vs. Methodist Episcopal Church*, 17 *Johas. R.* 577. In *Fettiplace vs. Gorges*, Lord Thurlow says: "I have always thought it settled, that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the *sole and separate right to dispose of it*. Upon the cases, I have always taken this ground: that personal property, the moment it can be enjoyed, must be enjoyed *with all its incidents*."

At the time of the death of Camilla Talton, she was the owner of the property, and could have alienated the same without any authori

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from John Liptrot, the supposed trustee, even admitting the title had been conveyed to him for the purposes mentioned in the deed. It was her *separate property*, and was enjoyed by her, "*with all its incidents*;" one of which is, that at her death, it passes to and vests in her legal representative, who is the plaintiff in error.—*Bradly vs. Hughes*, 11 *Eng. Ch. Rep.* 368; *Tullett vs. Armstrong*, 17 *Eng. Ch. R.* 17, 32. In *Jones vs. Cole*, 2 *Bailey's Rep.* 330, the same principle involved in this case was discussed and settled, so far as it regards the *execution of the trust*. That was an action of trover for two slaves. The plaintiffs gave in evidence a deed, executed by their mother, Anna Jones, afterwards Cole, by which she conveyed the slaves in question to Samuel Hughes, *in trust for her separate use* during her life; and after her death, for the *use of the plaintiffs*; and by a subsequent clause, appointed him to act as *trustee for the plaintiffs*, as well as herself. Samuel Hughes accepted the trust, and afterwards, being about to remove from the State, in pursuance of a power vested in him by the deed, assigned his trust to John Jones. The donor died in December, 1824. The defendant moved for a *nonsuit*, on the ground that the action should have been brought in the name of the *original, or substituted trustee*. But the presiding judge held, that the trust became *executed* at the death of the donor, and the plaintiffs, who were the *cestui que trusts*, were entitled to maintain this action in their own names; and his decision was sustained by the Court of Appeals, on the ground that, after the death of the donor, there was nothing to be done on the part of the trustee, to invest the plaintiffs with the title to the property. The object of the trust had been answered, as in this case. There was nothing to be done on the part of Liptrot, the supposed trustee, to pass the title to the legal representatives of Camilla Talton; her title to the property was perfect and complete, without any conveyance from him. In the case of *Jones vs. Cole*, the title to the negroes was conveyed by Anna Jones to the trustee, for the separate use of herself during life, and, after her death, for the use of the plaintiffs. The same position was assumed in that case as in this, that the *legal title* to the property was in the trustee, and therefore the suit should have been brought in the name of the trustee; but the court held, in that case, there was no conveyance necessary on the part of the trustee, to invest the *cestui que trusts* with the right of property, to maintain trover therefor.

Although the slaves were expressly conveyed to the trustee by deed, by the then owner, Anna Jones, in trust for the use of the plaintiffs, after her death, yet, the court held, the trustee had only a special property in the slaves, which terminated at the death of the donor, the object of the trust having been executed. So here, the object of the donor, or creator of the trust estate, in John Liptrot, (if you please to call it such,) was fully answered, by having the property protected against the marital rights of Henry Talton, during the coverture, according to the true intent and meaning of the parties to the instrument; and when the coverture was determined, by the death of the donor, the right of possession, as well as the right of property, vested in her legal representative. The trustee had no longer any interest in the property, after the dissolution of the coverture; his interest, and his only interest, in the property was, to protect it for the sole and

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arate use of Camilla Talton, during her coverture ; and had Talton died first, there would have been no further use for his services as trustee, to protect the property as against him ; and her dying first, does not make any difference ; *the trust was fully executed, so far as his interest as trustee was concerned in the property.* It was contended, that, inasmuch as the wife died first, the title to the property vested in her husband, under the act of 26th December, 1827.—*Prin. Dig.* 251. To have given him a right to the possession of the property, under that act, he should have taken out administration on his wife's estate. There must always be an administration, for the reason there may be debts to be paid. The question of conversion was discussed in the argument, by the counsel for the defendant in error, and we will express an opinion upon it, although it does not appear necessary, in the present stage of the case ; but it may become important, in its further progress, and it is the object of this court to prevent litigation, as far as possible. A conversion may consist in a *tortious* taking of a chattel, or in a wrongful assumption of property in it, or in making an illegal use of it ; if there be a deprivation of property to the plaintiff, it will constitute a conversion, though there be no acquisition of property by the defendant.—2 *Leigh's Nisi Prius*, 1477. A party may be guilty of a conversion, by dealing with, or claiming property in goods as his own, or even by asserting the right of another over them.—*ib.* 1480.

The action of trover being founded on a conjunct right of property and possession, any act of the defendant, which *negatives, or is inconsistent* with such right, amounts in law to a conversion. It is not necessary to a conversion, that there should be a manual taking of the thing in question by the defendant : it is not necessary that it should be shown, that he has applied it to his own use. Does he exercise a *dominion over it, in exclusion, or in defiance of the plaintiff's right* ? If he does, that is in law a conversion, be it for his own or another person's use.—6 *Bacon's Abr.* 677 ; *Bristol vs. Burt*, 7 *Johns. Rep.* 258 ; *Reid vs. Colcock*, 1 *Nott and McCord's Rep.* 600 ; *Reynolds vs. Shaler*, 5 *Cowen's Rep.* 323. But it is said, where a party comes lawfully into the possession of property, there must be a demand and refusal proved. This is undoubtedly true where the defendant finds the property, or where he gets possession of it, by the *consent of the plaintiff* ; the possession must be lawful as *against the plaintiff*.—2 *Phillips' Ev.* 225. Demand and refusal is only *evidence* of a conversion.—*ib.* 226. But where the defendant gets possession of property, as administrator, in right of his intestate, or where he gets possession of it as a purchaser, at sheriff's sale, under an execution against some third person, and uses and exercises dominion over the property as his own, it is a conversion, as against the rights of the plaintiff, who is a *stranger to the title, under which the defendant claims.* Although the defendant may obtain the possession of property under legal process, yet, if he assert a title or claim *hostile* to the plaintiff's right or title, under such legal process, it is a conversion as *against the plaintiff*.—*Hutchins vs. Bobo*, 1 *Bailey's Rep.* 546 ; *Tompkins vs. Haile*, 3 *Wend. Rep.* 406 ; *Bates vs. Conkling*, 10 *Wend.* 389 ; *Summerset vs. Jarvis*, 7 *Eng. Com. Law Rep.* 322. What is meant by defendant coming lawfully into possession of the property is, where he finds it, and retains it for the true owner : or where he

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obtains the possession of the property, by the *permission or consent* of the plaintiff, as where the relation of bailor and bailee exists. In this latter class of cases, a demand and refusal would be necessary, unless it could be shown the defendant had appropriated the article so found to his own use, or had disposed of the property bailed, contrary to the terms and stipulations of the contract of bailment. Our judgment, therefore, is, that the court below erred in nonsuiting the plaintiff, on the statement of facts presented by the record, for the reasons already given. Let the judgment of the court below be reversed, and the case reinstated.

No. 61.—SAMUEL T. BAILEY, plaintiff in error, *vs.* HENRY H. LUMPKIN, defendant in error.

Upon a rule to foreclose a mortgage, under the statute of Georgia, the mortgagor may show, by way of defence, that the contract upon which it was given was usurious.

The true test of the interest of a witness is, that he will either gain or lose by the *direct legal operation* of the judgment, or that *the record will be legal evidence for or against him in some other suit.*

Neither legal nor usurious interest can be recovered at law, in this State, upon a contract tainted with usury.

A security infected with usury is void in Georgia, *quoad* the legal interest, together with the usury, even in the hands of an innocent holder without notice.

The maker of a usurious note is not barred of the defence of usury, by standing by when it was transferred to an innocent holder, and not disclosing the fact of the usury.

In a case where the original transaction was usurious, and several renewals have taken place, and part of the interest reserved has been paid, the infection of usury follows all the securities given in renewal for the same debt, however varied in form and amount, and the amount paid on such renewals must be deducted from the original amount loaned.

Although the radical vice of a usurious contract attaches to, and infects all, future securities for the same loan, yet the contract may be purged: as, for example, if there is an accounting between the parties to a usurious contract, and all sums previously paid usuriously are deducted, and a new security given for the balance, the contract is said to be purged, and the last security taken is valid.

This was a rule to foreclose a mortgage on real estate, in the Superior Court of the county of Houston, at the instance of the plaintiff in error, as the assignee of Nathan H. Beal, against the defendant in error.

In compliance with the rule to foreclose, the defendant in error, who was the mortgagor, appeared in court, and disputed, upon oath, the amount claimed to be due, and denied that more than twenty-seven hundred dollars was due upon the mortgage; alleging that the mortgage, as well as the note, to secure which it was given, except the sum of twenty-seven hundred dollars, was void for usury. The defendant in error then proceeded to file the plea of usury, setting forth circumstantially the original

transaction, and the usury exacted, and several subsequent renewals, and the usury exacted thereon, and also divers payments made by the defendant in error upon said transaction, and claiming that they should be deducted from the original amount loaned, which, if done, would leave the amount above mentioned as the balance due.

At the April Term, 1846, the said rule to foreclose, and the issue thereon made by the defendant's plea of usury and payments, as aforesaid, came on to be tried on appeal in said Superior Court, before Judge Floyd, when the plaintiff in error moved to strike out the plea or affidavit of the defendant in error, on the ground that the statutes of Georgia did not contemplate or authorize the setting up of *usury* at law against a mortgage, on his proceedings under a rule to foreclose his mortgage. Which motion was overruled by the court, and the plaintiff in error excepted.

The counsel for the plaintiff in error then introduced, and read in evidence to the special jury, the note and mortgage described in the rule nisi, and then closed his case.

It appeared that Nathan H. Beal, the original payee and mortgagee in said note and mortgage, had assigned the same to the plaintiff without recourse.

The counsel for the defendant in error then introduced the said Nathan H. Beal as a witness, to prove the usury and payments alleged in the plea; to whose competency, for that purpose, the plaintiff in error objected, which was overruled by the court below, and the witness was ordered to testify. To all which the plaintiff in error excepted.

The witness, Beal, testified as to the usury, and as to the payments made upon the renewals, &c. He also testified, that before he assigned the note and mortgage to the plaintiff, that himself, with plaintiff and defendant, had an interview, in which the defendant urged both of them, witness and plaintiff, to use their best exertions with certain legatees, who were to receive the proceeds of said note and mortgage, to get indulgence for him until the next fall or Christmas, when he would pay every dollar of the same, principal and interest. That the defendant did not disclose to the plaintiff that there was any usury in said note, nor any other objection to its validity; nor did the witness disclose to the plaintiff that the transaction on which the note and mortgage were given was tainted with usury. Shortly after this interview, on the same day, the plaintiff became possessed of the note and mortgage, by the assignment of witness, and gave to the defendant the indulgence desired by him. From aught that appeared upon the trial, the plaintiff was an innocent holder without notice. The defendant's counsel here closed their case. The plaintiff then produced a letter, addressed to him by the defendant, dated Houston, January 20th, 1844, (being the day after the note and mortgage were assigned to plaintiff,) as follows, to wit:

"COL. S. BAILEY:

"Dear Sir—I feel a considerable anxiety to know the event of the settlement made at Perry, between Beal and Bostwicks, so far as I am interested. Will you be so good as to write me what disposition was made of my paper held by Beal, if any? I well know I have nothing to claim from the Bostwicks, but from Beal much. I am fully apprised in

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been disposed to deal hard with me, but he should recollect, if he sues me, I can claim the advantages of the law, and most assuredly I will do so under existing circumstances; but, if waited with till the end of the present year, I will pay every dollar of the debt. I only ask this of Beal; he should grant it me. Will you be so good as to say to me by letter if Beal or the Bostwicks control my note at this time; and, if Beal has put it out of his control, what course will be taken by those who control it. Your answer to this in full will very much oblige your friend.

"Respectfully yours,

"Answer me at Perry."

"H. H. LUMPKIN."

And proved the said letter to be in the hand-writing of the defendant, and offered to read it in evidence upon said trial, when the counsel for the defendant objected, and the court below sustained the objection, and the letter was rejected. To which the plaintiff in error excepted.

After argument to the jury, the court below charged, that, by the laws of Georgia, neither legal nor usurious interest could be recovered on a contract tainted with usury; and that it made no difference whether the contract was in the hands of the payee or of an innocent transferee; and that any payments of either legal or usurious interest made at any time on previous or prior renewals, must be deducted out of the sum originally loaned, and that the balance was all that the plaintiff was entitled to recover. To which charge of the court below the plaintiff in error excepted.

The plaintiff in error then requested the court below to charge the jury as follows:

1st. The plaintiff, on the foreclosure of a mortgage, when the defendant sets up the plea of usury, is entitled to principal and legal interest.

2d. That where there have been renewals and payments of interest made, the note sued on being for eight per cent., defendant cannot deduct, from the note sued on, the interest paid on renewals.

3d. That the defendant, knowing that the note was about to be transferred by said Beal, and not notifying the plaintiff that there was any usury to be plead against the note, but representing to the plaintiff that it would be fully paid, he could not set up usury against the plaintiff.

Which the court below refused, but charged the jury that the contrary thereof was law. To which the plaintiff in error excepted.

S. T. BAILEY, in *propria persona*.

As to the first ground, that the court refused our motion to strike out the defendant's plea of usury, we think, from reading the words of the statute, (*Prince*, 424,) it will appear that the court erred; the statute changed the former law; it is therefore to be construed strictly. It provides for the mortgagor to set up a defence to this summary proceeding: a proceeding intended not to supersede the old mode of foreclosure by bill, but cumulative of that, and for the facility of the mortgagee. But the door of equity is still left open to both mortgagee and mortgagor, if justice requires it, or they have cause. Wherefore, the Legislature confines the mortgagor to only two grounds of defence in this summary proceeding: it declares that if payments have been made, and yet not credited or if there are sets-off which ought to be allowed in equity, the

mortgagor may make oath thereof: hence, the maxim of law applies, that when a statute includes by enumeration one or more of a class of rights conferred, it is an exclusion of all others; or, in mathematics and logic, an exclusion of a conclusion. It cannot be said, with reason, that because the statute has said to the defendant, that he may come in and set up two specified defences, he is therefore entitled to set up any defence. *Expressio unius est exclusio alterius*.

He cannot swear that he has made payments that have not been credited; he swears they have been allowed and credited on the renewals: he cannot swear that he has sets-off that ought to be allowed in equity; such sets-off are unknown to equity, even of the usury paid, much less of legal interest paid; even as against the original payee, much less is it allowed against a transferee for valuable consideration, as we shall show hereafter.

As to the second ground, that Beal was not a competent witness, we rely on the well-settled principle, that if the witness is interested in favor of the party producing him, he is incompetent, but not for the other, to some extent. Now, the record shows that Beal transferred the mortgage without recourse, so that he is secure, although the plaintiff fail to recover. But if the rule is, as laid down by the court below, that usurious interest is recoverable back, then, if the defendant fail, and the plaintiff recover the full amount of the note, he can recover it back out of Beal. A party for whose use an accommodation note is made, is incompetent for the one who has used his name.—1 *Greenleaf Ev.* sec. 401. But it seems to us that the court below was led into what we deem, most respectfully, the many errors which it committed, chiefly from having taken for granted that usurious contracts are void, and not merely illegal, aided perhaps by its repugnance to usury. If this proves to be a fallacy, as we hope to maintain, then the whole structure falls to the ground. We will endeavor to show that such contracts are only illegal, and not void: and so recoverable in the hands of an innocent holder.

It requires no authority to convince or inform this court that a contract may be illegal, and yet not void; that contracts not *malum in se*, but only prohibited, without a declaration of their nullity *ab initio*, are only voidable, and are binding in the hands of innocent holders. Mr. Chitty says: "Illegality of consideration is no defence to an action on a contract in the hands of a *bona fide* holder, unless it is expressly declared to be void by the Legislature."—*Chitty on Bills*, 86-7; 2 *Esp. R.* 530; 7 *T. R.* 630; *ib.* 390.

Indeed, so reluctant are the courts to declare contracts void in the hands of the innocent—thereby punishing them and not the guilty—that it is by no means settled law that contracts, declared void by the Legislature, are so in the hands of the *bona fide* holder. Hence Mr. Dwarries concludes, that it cannot be assumed in all cases that contracts declared void by the Legislature are so in the hands of innocent holders, and lays down, as the only infallible test, the addition of a penalty imposed upon those making or entering into contracts, declared void by the Legislature.—*Dwarries on Stat.* 742.

It is well known that the English courts did not arrive at a uniformity of decision upon the statutes of gaming and usury, until after long conflict of judgment. The Court of King's Bench first settled the law, as now stands, upon the exceeding strong language in the several sta^{tutes}

upon gaming; and then came the leading case of *Lowe vs. Waller*, (2 *Doug. R.* 736,) which settled the rule upon usurious contracts, in the hands of innocent holders. In that case, Lord Mansfield, after expressing his great leaning in favor of the plaintiff, remarks: "But the words of the act are too strong; besides, we cannot get over the case on the statute of gaming, which stands on the same ground."—2 *Doug. R.* 744. It will be found, on reference to decided cases, both English and American, that the courts have held usurious contracts void, in hands of innocent holders, expressly on the ground that such contracts are, by their several statutes, declared void—not that there is anything in such contracts, *per se*, corrupt or morally dishonest; and they have often very strongly intimated their opinion, that the law, as it stood, worked great injustice, and aided dishonesty. Hence, so early as 58 *Geo. 3*, the English Parliament declared such contracts recoverable, in the hands of innocent transferees. New York passed a like statute in 1830, and several other States have also adopted this obvious principle of justice.

The English judges having raised some difficulties, touching the enforcement of the act of 58 *Geo. 3*, under certain state of facts, which often arose before them, the Parliament, to remove all doubt, and to protect innocent holders under all circumstances, passed the act, (5 and 6 *William 4*, ch. 41,) which, after reciting that several statutes against gaming and usury made void all instruments tainted therewith, thereby working great hardship to innocent transferees, enacts, among other things, that "such instruments shall be deemed and taken to have been made, drawn, accepted, given, or executed, for an *illegal consideration*."

The second section of the act provides that, notwithstanding an innocent holder may recover, yet that the maker, after payment, may recover back the amount from the original usurious lender.—See the act in note to *Hitchcock vs. Way*, 33 *vol. Eng. Com. Law R.* 250.

This act covered the whole question; it made gaming and usury merely illegal; that is, the contracts founded thereon, forbidden by law, and, therefore, voidable, not void. The able jurists who drew this act of parliament, were well aware of all the consequences which would follow. They knew such contracts may be avoided, as between the original parties, but not against innocent holders; this they intended. They also knew, that being merely illegal contracts, money once paid under them could not be recovered back; this they did not intend, and therefore added the second section of the act. The case of *Hitchcock vs. Way*, (6 *Ad. and Ellis*, 943, 33 *Eng. Com. L. R.* 249,) was on a gaming contract in the hands of an innocent holder, but made before the act of 5 and 6 *William 4*. The court held, on that ground alone, that it was not saved by the act, and was therefore void. That the courts of Georgia have, so far as we know or believe, held usurious contracts subject to the same defence, in whosoever hands they may be, and that nothing but the principal could be recovered, we are free to admit; and yet, without intending any disrespect, we beg to add, we have never heard or seen a sensible, much less a legal, reason given for such decisions. The only reason we ever heard given, is, that the reported decisions on a statute of usury, in England and America, decide such contracts void in the hands of everybody; and this is true under the old usury laws; but, as we have already remarked, such decisions are expressly on the ground, that

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the statutes declare them "utterly void." And so was the law in Georgia, up to 1822. The old colonial statute of 1759 is but a copy of the statute of Anne. Its terms are, "shall be utterly void." Doubtless, the practice of deciding under this ancient statute, led the courts into the error, to some extent, of following the spirit of its provisions after it expired in 1822. Our act of 1822 was passed about three years after 58 Geo. 3, and was probably suggested by it; but both acts were but fore-runners of a better age. Will any man contend that it is not a reproach to any civilized people to maintain a law that punishes the innocent for the sins of the guilty, as the old usury laws, confessedly, often did? Can the laws of Georgia bear this reproach? Will the court seek for a construction which will fix upon our law such reproach? The Legislature expressly declares that the contract shall not be void, and that no forfeiture shall be incurred, but that no more than the principal shall be recoverable. They thus make the contract merely illegal, in the same manner as if they had declared that such contracts shall not be paid, but that neither principal nor interest shall be recoverable in such case; the original parties could not recover on such contracts, yet innocent parties might. Whenever the Legislature prohibits a contract, without more, the parties cannot recover on it; it is illegal; and yet innocent holders may. In this instance, the Legislature have said that only a part of the sum secured shall not be recovered. Does that render the contract less valid than it would have been if they had prohibited a recovery of the whole? Such a proposition assumes a mathematical absurdity. It assumes that the parts are greater than the whole. Without multiplying authorities upon the point now under discussion, I ask leave to refer the court to the decision of the Supreme Court of the United States, in delivering the unanimous opinion of the court, in the case of *Fleckner vs. The Bank of the United States*. Judge Story said, "The act has not pronounced that such a violation makes the transaction or contract *ipso facto* void, but has punished it by specific penalty of treble the value. It would therefore remain to be shown how, if the bank had a general right to discount notes, a contract, not made void by the act itself, could on this account be avoided by a party to the original contract, who was not a party to a subsequent transfer." "The statutes of many of the States, as well as of England, contain an express provision that usurious contracts shall be utterly void, and without such provision the contract would be valid, at least in respect to persons who were strangers to the usury."—5 *Cond. R. S. C.* 464; 8 *Wheat.* 336.

Our statute expressly declares that usurious contracts shall not be void.—*Prin. Dig.* 295. Now, it cannot be legally contended, that the plaintiff in error, having taken the note after it was due, is not an innocent holder; for, in the first place, the court below did not put his decision upon that ground, nor was it insisted on in the court below; and secondly, the evidence shows, that plaintiff did in fact take without notice, either express or implied. A note overdue, is held to carry implied notice to the purchaser, upon the principle that it says to him, this note, not having been paid according to promise, has been dishonored for some legal or equitable cause, rendering it invalid, and therefore warns the purchaser to inquire of the maker if such is the fact. But did any court ever maintain or decide, that if such was made and no objection was disclosed.

the maker stood by, and witnessed the transfer or negotiation of his note to an innocent purchaser for a valuable consideration, that he could set up any defence to the note because it is overdue? The books are full of authority to the contrary. Some authorities have gone so far as to decide, that if a prior mortgagee witnesses a subsequent mortgage to the same property, and does not disclose his mortgage, he shall be postponed, although it is not proven that he knew the contents of the deed he witnessed; and this on the bare presumption that he did know, so stringent are the courts against fraud. A note over due is just as negotiable as one not due, only one puts upon inquiry, the other may be taken without distrust. The inquiry to be made is not as to all defences in detail; all that the purchaser has to satisfy himself about is, whether there is any defence; and if the maker stands by, sees his note about to be traded, and is inquired of as to when he can pay, and does not disclose any defence to the note, he virtually, by his silence, assents that there is no defence; and if he afterwards sets up a defence, it is a fraud—a *suppressio veri* and a *suggestio falsi*—which all courts discountenance, instead of aiding. All this was admitted by the court below in ordinary cases of contract; but, forasmuch as the court held usurious contracts utterly void as to the interest in the hands of an innocent holder, it decided that neither fraud nor anything else, even an express promise to pay by the maker, could make the interest recoverable. We believe that we have shown that usurious contracts by the law of this State are only illegal, and not void; and if so, the corollary of the court below, being founded on false premises, is itself erroneous; and since the plaintiff in error purchased with the assent and acquiescence of the defendant, unapprised of any taint of usury, he took the note as an innocent purchaser. But admitting, for sake of argument, that such a contract is void, and not merely illegal, the court erred in deciding that the defendant, by his fraudulent conduct, could not be estopped from setting up his defence of usury. It is not true that such contracts, even under the old law of usury, which made them void, could not under any circumstances become binding. The courts have ever looked upon such defences with disfavor, and have felt that while they followed the decisions annulling such contracts in the hands of innocent holders, they were aiding, *strictissimo jure*, an iniquitous defence. Hence, whenever such party stepped within the pale of a court of equity, that court compelled him to pay principal and interest; saying to him, he came there with unwashed hands. How much less then would any court sanction fraud in such a party? Fraud is a subject as much discountenanced by courts of law as courts of equity. Their jurisdiction is concurrent upon all questions of fraud. In South Carolina, where all usurious contracts are declared void by statute, their courts have held that if a maker of a note stood by, and saw his note transferred for a valuable consideration to an innocent purchaser, without disclosing the usury, he could not afterwards set up such defence.—2 *Bailey's R.* 59. Judge Story sustains, by abundant authority, that if a party, by his silence or acquiescence, misleads another, he shall be estopped from ever setting up defence or claim against the right or title acquired by that other; or if one only stands by, and in silence suffers another to commit a fraud, he shall be bound by such fraud, upon the maxim, *Fraus est celare fraudem*.—1 *Story's Equity*, sec. 394.

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389. So stringent are the courts of England against fraud and deceit, that the King's Bench have held, that if the insured knew of a mere rumor which would likely enhance the premium of insurance, and which rumor proved to be false, and did not apprise the underwriter of such rumor, the policy was void.—*Lynch vs. Durnsford*, 14 East R. 434.

If, then, it was legitimate to prove fraud to bind the defendant the latter in question, which the court below repelled, was legal proof. It was further legal proof to show a promise on the part of the defendant to pay to an innocent holder a note invalid only in the hands of the original payee for a valuable consideration—that of further indulgence. But our process of foreclosure of a mortgage is only a substitute for the former mode by bill in equity. The Legislature wisely deemed, that if the debtor had no defence to make, it was unjust to the creditor to require him to raise a useless litigation: therefore they declared, that as the presumption was against one who had acknowledged a debt by a solemn deed of conveyance, the creditor need only call on him to show if he had any defence by matters arising subsequent to his acknowledgment of the debt by deed; so that the whole litigation, if there is any, is raised by the mortgagor: he is the actor; he makes up the issue by his affidavit—on that, and that alone is the issue formed in every case; so that if the court should hold that the defendant may set up usury as a defence against a mortgage at law, still he, being the one who raises the litigation, and shows the usury by his affidavit, it is in effect a proceeding in equity; and the fact that the whole proceeding is before the judge and a special jury, with which a petit jury has nothing to do, shows that the Legislature considered it an equitable proceeding, and if so, the defendant is bound to pay legal interest according to the rule in equity. If goods are pawned on usurious contracts, they cannot be redeemed without proving a legal tender of principal and interest—*Fitzroy vs. Guillim*, 1 T. R. 153. So, if a mortgage of land be made to secure a usurious contract, it cannot be redeemed without paying principal and legal interest.—12 Serg. and Rawle, 46.

In Pennsylvania they foreclose at law.

The court also erred in deciding that the plaintiff was entitled to only the balance of the original sum loaned, after deducting all the payments therefrom; for all the payments were made, and the renewals took place between defendant in error and Beal, before the transfer to plaintiff; and the note transferred is proven to be for the balance due, after all payments, and on which only legal interest is reserved.—*Chadbourne vs. Watts*, 10 Mass. R. 121. If the court should hold that usury may be set up on the foreclosure of a mortgage, still, how can the mortgagor be allowed to set up payments of interest, and deduct them out of the principal? When the statute says he may set up such set-off and payments as ought to be allowed in equity, would equity allow these? These payments of interest can only come in, in nature of set-off; for it is in contemplation of law a reception of money by a party not entitled to it, if it is considered as payments on usurious consideration. Clearly such set-off cannot be allowed against a transferee for value, although he take the note after it is due.—6 Cowen R. 693; 1 Paige R. 112, 624. But again: most clearly nothing can be set-off by what may be sued for. A set-off is a cross-action. Now, whose



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dreamed—much less, what court ever before decided—that legal interest, after having been paid, could be recovered back? Furthermore, if our position be founded in law, that usurious contracts are merely illegal and not void, the defendant could not recover back money paid on this contract, even out of Beal, and of course he could not set off such payments, which would be equivalent to a recovery. How much less shall he be permitted to recover such amounts of payments out of a transferee, who has had no hand in violating the law or in doing him wrong, and who has not received one cent of the sum thus unjustly claimed.—*Doug.* 468; 3 *T. R.* 266; *Cowp.* 790; 1 *Hen. and Munf.* 33; 2 *Moore R.* 538; *Maule and Sel.* 500; 6 *Mass. R.* 84; *ib.* 381; 5 *Mass. R.* 385; 3 *Pick.* 446; 6 *Cowen*, 431; 2 *Fairf.* 306; 8 *T. R.* 575.

It is no answer to say, the endorsee may have his recourse back upon his endorser to recover his losses. This is often a frail reliance; and besides, it is not in consonance with the ideas of Christian civilization and just laws to permit one who has been wronged to take his redress out of the pocket of an innocent party, and then coolly say to him, you may take your redress out of the man that has wronged me.

WASHINGTON POE and ROBERT V. HARDEMAN, for the defendant in error.

CHARLES J. M'DONALD, for the plaintiff in error, in conclusion.

The statute of Georgia does not authorize the defendant to set up usury against the mortgagee's demand on a motion to foreclose. It is only in cases of disputes arising in regard to the amount due upon a mortgage, where payments have been made, or where there are sets-off which in equity ought to be allowed, that the party may arrest the proceedings against him under the statute. The statute prescribes the mode of procedure and the objections which the mortgagor may make.—*Prin.* 424. The amount or sum due is to be ascertained from the face of the papers, unless the defendant could prove payment. Statutes are to be construed one part by another, and statutes in *pari materia* are to be construed together. What the Legislature intended, is expressed in the 16th section of the judiciary, (*Prin.* 424,) viz: payments and sets-off. Usury is neither a payment, nor is it a set-off, and never is pleaded as either. It is not so pleaded in this case, and of course was not so regarded by the defendant. The 2d and 3d points have been decided by the Supreme Court. The court erred in charging the jury that neither the usurious interest nor legal interest can be recovered by an innocent holder of a note tainted with usury. This was true under the act of 1759, which declared the contract void.—*Prin.* 294. But now, by the act of 1822, (*Prin.* 295,) it is declared that the contract shall not be void on which a greater than lawful interest is reserved.

Illegality of consideration is no defence in an action at the suit of a *bona fide* holder, without notice of the illegality, unless he obtained the bill after it became due, or unless it has been so expressly declared by the Legislature.—*Chitty on Bills*, 116.

In no case is the innocent endorsee of a note or bill of exchange, affected by the consideration passing between the original parties, except

in cases in which the Legislature has declared the instrument void. If the instrument be void between the original parties, and as between them subject to the common-law maxim, that *in turpi contractu non oritur actio*, the *bona fide* holder is not affected by it, unless the legislative act declares it void. It is all the same, if the consideration be illegal at common law, or is declared so by statute, the *bona fide* holder who has a higher equity, and is always favored in the law, is protected.—*Kyd on Bills*, 280, 283; *Byles on Bills of Exchange*, 81; 2 *Espinasse*, 534; *Smith's Mer. Law*, top page. Contracts tainted with usury are not declared void by our statute, but are expressly declared to be not void. In the hands of a *bona fide* holder, then, promissory notes and bills of exchange, the consideration of which is usurious, are not void, but recoverable.

But it may be contended, that the note and mortgage, having been assigned after maturity, the assignee took them, subject to all the defences that might have been set up against them in the hands of the original holder.—*Story on Bills*, 210; 3 *Kent*, 79. This rule is not without exception, or perhaps it may be proper to say, that this is not the rule. The true rule is, that when a note over due is offered, its being over due, being out of the common course of dealing, is of itself such a suspicious circumstance as makes it incumbent on the part of the party receiving it, to satisfy himself that it is a good one.—*Chitty on Bills*, 243. It is the duty of the endorsee, if he takes the bill after it is due, to make inquiry concerning it.—8 *Taunt.* 19; 3 *T. R.* 82. In this case, the assignee held conversations with the maker of the note and mortgagor, who, so far from making objection, promised to pay it, and the assignee took it under these circumstances. He is a *bona fide* holder, to all intents and purposes.

The court erred, we maintain, in refusing to charge that the plaintiff, on the foreclosure of a mortgage, when defendant sets up usury, is entitled to principal and legal interest.

The defence of usury cannot be made in the shape of a plea of set-off.

It is a defence against the consideration. A plea of set-off admits the plaintiff's demand, but alleges a counter-demand. In this case, the defendant has pleaded to the consideration, and not a set-off. When a statute prescribes a mode of proceeding, or a remedy, that must be pursued, and the defendant is entitled at law to the defences only which the statute authorizes. A set-off is, indeed, admissible only in cases of real estate, and they must be pleaded and allowed before foreclosure.—*Prin.* 424. If the mortgagor has made payments, or has amounts due him from the mortgagee, which by agreement are to be applied to the mortgage, such payments and amounts would of course reduce the amounts due upon the mortgage, and these would be allowed as part payments.

But to allow the mortgagor to bring in any demand which he might have against the mortgagee, and set it off against the mortgage debt, would be to destroy the mortgage security. The mortgagee might have other demands against the mortgagor besides those secured by the mortgage, and for which he holds no security. It would be unjust, therefore, to allow sets-off to be pleaded, except such as apply specially

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to the mortgage. A bill might be filed, perhaps, to settle all accounts, but then equity would only allow ascertained balances of other accounts to be applied to the mortgage.—4 *Johas. Ch. R.* 616; *Hopkins*, 270. But what is sought to be brought in by defendant is, not a set-off, but an objection to the consideration, which is not admissible by the statute. The mortgagee must swear to the amount due on the mortgage. This, of course, is to be ascertained by the agreement between the parties.

A debt is a sum of money due by certain and express agreement, as by a bond for a determinate sum, a bill or note; a special bargain; a rent reserved on a lease; when the quantity is fixed and specific, and does not depend on any subsequent valuation to settle it.—3 *Black. Com.* 154, side page. The amount due, then, appears upon the note or mortgage. The illegality of the consideration is matter of avoidance, and, in actions at law, must be specially pleaded.—1 *Chitty* 551.

The statute does not authorize the defendant to arrest the proceedings of the mortgagee or his assigns, for any matter of avoidance or illegality in the consideration. It is only where there is a dispute as to the amount due. The mortgagor is not without a remedy in such case against the mortgagee, though against a *bona fide* assignee he is remediless. The assignee, in this case, is so *bona fide*; for he was not cognizant of any defect in the consideration, and the mortgagor, knowing that he was about to trade for it, did not inform him of difficulty, and encouraged the negotiation by promising to pay it. Were the mortgage in the hands of the mortgagee, or were the defence available against the assignee, the mortgagor might file his bill to enjoin the proceedings, and have the usury inquired into. He, therefore, in any event, has his remedy, but it is in equity. But were he to file his bill, the court would require of him to do equity. He must, in that case, pay up the principal and interest. The court will not give a latitudinarian construction to the statute to let in an inequitable defence.

A court of law, in the exercise of its equitable powers, will put the party, in whose favor they are exerted, on terms. This has been expressly adjudicated, *Fitzroy vs. Gwillim*, where the plaintiff, in an action of trover, for the recovery of goods pledged for a usurious loan, was required to pay principal and legal interest before she could recover. Lord Mansfield decided the action of trover was an equitable action.—1 *Term R.* 154; *Hindle vs. O'Brien*, 1 *Taunton*, 414.

The authority of these cases has been questioned. The principle of them is maintained, and they have been questioned only on the facts, except that the Court of King's Bench, in one case, (*Roberts vs. Goff & Barn. & Atk.*) refused to recognize as authority the practice of the common pleas.

His Honor Judge LUMPKIN gave no opinion in this case, the defendant in error being a relation.

By the Court—NISBET, Judge.

This was a proceeding under our statute to foreclose a mortgage upon real estate. The petitioner, S. T. Bailey, Esq., was the assignee of the note and mortgage securities, having taken them after the maturity of the

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note. The defendant filed the plea of usury, also, alleging payments, which plea was verified. Upon the trial below, the counsel for the plaintiff moved the court to strike out the defendant's plea, upon the ground that the statutes of Georgia do not contemplate, or authorize, the setting up of usury at law against a mortgage on a rule to foreclose. This motion was overruled, and that is claimed to be the first error committed by the presiding judge in this cause.

The act of 1799, (*Prin. Dig.* 423, 424,) after prescribing the mode of proceeding to foreclose a mortgage on real estate, farther enacts as follows: "And, in case of any dispute as to the amount due on any mortgage, if the mortgagor shall appear within the time prescribed by this act, and make affidavit that he hath made payments which have not been credited on said mortgage, or that he is entitled to sets-off, which in equity ought to be allowed, the court shall appoint one or more fit person or persons to audit and liquidate the same; but either party shall be entitled to a new trial therefrom," &c. It is argued by the counsel for the plaintiff in error, that the right of defence against the foreclosure of a mortgage, given by this statute, is limited to payment and equitable off-sets, and, inasmuch as the plea of usury is neither payment nor set-off, it cannot be allowed. The terms of the statute do not explicitly embrace such a plea, nor yet do they necessarily exclude it. The act declares, that in case of *any dispute* about the amount due on a mortgage, if the mortgagor shall appear within the time prescribed, and make affidavit of having made payments not credited, or that he is entitled to off-sets which in equity ought to be allowed, the court shall appoint persons to audit and liquidate the accounts between the parties, &c. As to payments and equitable off-sets, they are to be verified and submitted to auditors; the statute is very explicit as to the right and mode of defence, so far as these are concerned. But is the defence necessarily confined to these? The act contemplates a dispute about the amount due, and seems to admit the right of contesting the amount due upon other grounds, as well as those of payment and set-off. The statute of Georgia inhibits the collection of lawful and usurious interest upon contracts tainted with usury, when attempted to be enforced against the borrower. Now, the statute which, when plead and sustained, reduces the amount of the plaintiff's recovery by the lawful and usurious interest, is neither payment nor set-off. But the plea of usury does create a dispute about the amount due; it makes an issue as to the amount the plaintiff is entitled to recover. How would it be if the mortgage was given to secure a note given for a gaming consideration, or to compromise a felony? Would, in such case, the defendant be debarred his defence? It is worthy of attention, in construing this statute, that usury is a defence allowed rather in furtherance of that public policy upon which laws are founded, than as a favor to the borrower. If a contract by law is utterly void, the defence upon grounds of public policy ought to be let in. *Quoad* the interest, this court has determined that usurious contracts are void.

The maxim "*expressio unius est, exclusio alterius*," the express mention of one thing implies the exclusion of another, is frequently quoted in our courts. It was claimed to apply to the construction of this statute.

It may not be, therefore, amiss to look into its meaning, and

how far it is applicable in the construction of statutes; and endeavor to reduce it, if possible, from a vague generality to a definite signification. This maxim applies, in the first place, rather in the construction of contracts than statutes, and more particularly to deeds. We are not to be understood, however, to say, that it is not at all used in the interpretation of statutes. A maxim very nearly identical with it, to wit, *expressum facit cessare tacitum*, applies more particularly in the construction of statutes. This maxim then only means, "that if you expressly name (in a deed or other contract, for example) some, out of certain requisites, the inference is *stronger* that those omitted are intended to be excluded, than if none at all had been mentioned."—*Broom's Legal Maxims*, 278-9, 280; 9 A. and E. 953. The inference drawn from the fact of specification is *stronger* but not *conclusive*, that all other things are excluded. Now, in the act of '99, because payments and equitable offsets are expressed, the inference is not conclusive that no other grounds of defence are to be admitted. This act is open to this construction, to wit: the Legislature, in mentioning payment and equitable offsets, intended, in the *first* place, to put the defendant upon terms, as to these two grounds of defence; (this is proven in the requirement that they shall be filed within a specified time, and verified;) and *secondly*, to create a board of auditors to liquidate the accounts when they are filed; leaving all other defences where the general law places them. This construction is aided by the direct reference made in the act to disputes as to the amount due. That is to say, when there is a dispute between the parties as to the amount due, and that dispute has reference to payment or equitable sets-off, the mode of defence prescribed in the statute must be followed; but if the dispute has reference to any other legal defence, then as to *that* the general law of pleading obtains. In the application of the maxim, *expressum, &c.*, to statutes, it is not to be understood that where the Legislature has put the strongest cases, the lesser are therefore to be excluded; but, on the contrary, there are cases where, by construction, the greater are intended to include the less.—*Broom's Legal Maxims*, 285.

But the view of this subject, which to the mind of this court is decisive, is this: The process of foreclosure in England is by bill in chancery. Our statute dispenses with the equitable proceeding, and gives a more easy, direct, and less expensive process of foreclosure at law. This legal mode is in lieu of the bill in chancery. This is, therefore, what we are in the habit of calling an equitable statute; it is not in derogation of the existing law, and, therefore, to be construed strictly; but it is declaratory of it, and remedial, and, therefore, to be construed liberally. It affirms the law of foreclosure, by providing a different remedy under it. The mortgagee, instead of being driven into a court of chancery to foreclose, is admitted at law to all the rights which he had before the statute, in equity, as to this subject matter. Can we infer that the Legislature intended to give this new and summary mode of foreclosure to the mortgagee, and not give equivalent rights of defence to the mortgagor? to create for the plaintiff an easy and rapid mode of foreclosure, and still hold the defendant to the necessity of going into a court of equity, to assert his rights against it? The Legislature intended to do no such iniquitous thing. Upon the creation of a new remedy, we think the rights of defence which belonged to the old

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remedy, unless expressly inhibited, attach to the new. As the plaintiff is here let into the rights at law, which he before had in equity, so the defendant is let in, also, at law to those rights which he before had in equity. It will not be denied but that in England, upon a bill, to enforce a usurious security, the defendant could plead the statute of usury. If so, he may, under our statute, against a process to enforce a usurious security, also plead the statute of usury. Such a plea is not, as we think, expressly, or by fair construction, inhibited by the act of 1799.

The enumeration of certain defences which he may make, and the manner of making them, does not, under these views of this subject, exclude all others. It is a sound general principle, says Broom, in the exposition of statutes, that less regard is to be paid to the words used than to the policy which dictated the act.—*Broom*, 247.

Now, the policy of the act of 1799 was to give to both parties the rights at law, which could only be asserted in England, by a tedious and costly proceeding in equity. Again, where the words are general, and a statute is only declaratory of the common law, it shall extend to others, besides the persons or things named.—*Broom*, 285-6 ; 14 *Mass*, 92-3 ; 3 *Hill*, 472.

We think, therefore, that the court did not err in refusing to grant the motion to strike out the defendant's plea.

The second ground of error is, that the court improperly admitted N. H. Beal, the payee of the note, and mortgagee, and also the transferor of the mortgage, to be sworn in the case. The witness was called by the defendant to prove usury in the contract. The record discloses that the mortgage and note were transferred to S. T. Bailey, by Beal, the witness, without recourse upon him.

The only ground relied upon by the plaintiff in error, to exclude Beal, was interest. The disqualifying interest of a witness must be *some legal, certain and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence in support of his own claims or against him in a subsequent action.*—1 *Greenleaf*, sec. 386 ; 1 *Starkie Ev.* 102 ; 3 *C. R.* 27 ; 6 *Bing.* 390 ; 7 *C. R.* 62.

The true test of the interest of a witness is, that he will either gain or lose by the *direct legal operation of the judgment, or that the record will be legal evidence for or against him in some other action.*—*Greenleaf*, sec. 390 ; *Gilbert Ev.* 225 ; 3 *C. R.* 27 ; *East*, 581. The application of these two rules to this case will determine the interest and, therefore, the competency of this witness. We think that the fact of the transfer being made without recourse, by Beal to the plaintiff, Bailey, very materially affects this question. Bearing this fact in mind, we apply the test. It is very clear that he could not gain or lose a single cent by the direct legal operation of the judgment. Let that be for the plaintiff or the defendant—for the whole amount of the plaintiff's claim, or for less—its legal effect will not be to put anything into his pocket or abstract anything therefrom. Having parted with these securities, the judgment will be *inter alios*. Can the record in this case be legal evidence for or against him in some other action? He is called to prove usury in the securities, which he has transferred to the plaintiff. Suppose his testimony does not establish the usury—could it in that ev

affect, in any way, the rights of the plaintiff? Could the record, in that event, be legal evidence for or against him, in any suit which might afterwards occur between him and the plaintiff? We think not; because, in that event, the plaintiff's rights would be the same, and the judgment, so far as his testimony affects it, the same as they would be if he was not sworn at all.

But, in point of fact, he did establish the usury, and the effect of his testimony was to reduce the amount of the plaintiff's recovery. Now, if he, by his contract with the plaintiff, was liable over to him as transferor of these securities, in that event, the record of this case would be evidence against him, in an action by the plaintiff for the loss sustained upon them. But, by his contract with the plaintiff, the plaintiff agreed to take the securities at his own risk, without recourse upon Beal. Such being the case, we do not believe that this record could be legal evidence, for or against the witness, in any suit which we can imagine could originate between him and the plaintiff. How, then, will he stand affected towards the defendant? If he proves no usury, then the record will be just as though he had not been called, and if he does, then defendant is allowed it, in this action, as a credit upon the plaintiff's claim, and could not recover it a second time, out of anybody. So that we do not perceive that in any possible contingency the record of this action could be legal evidence, in favor or against the witness; our judgment is that he was competent.

We did not understand the third ground to be insisted on in the argument, and shall therefore express no opinion upon it.

The fourth exception alleges error in this, that the court charged the jury, that neither legal nor usurious interest can be recovered on a contract tainted with usury; and it made no difference whether it was in the hands of the original payee or an innocent endorsee.

The Legislature of Georgia have declared, that upon all contracts tainted with usury, the principal of such contracts only shall be recovered.—*Prin. Dig.* 295. As a general proposition, we think it is true, that neither legal nor usurious interest can be recovered in this State upon usurious contracts. We know of but one instance in which the lawful interest, even, can be recovered; and that is, where the borrower is compelled to go into equity, to prove that the contract is usurious. In that case he will be held to do equity, that is, pay the principal and legal interest, before he can be relieved from the payment of the usurious interest. Nor does it matter whether the usurious contract is in the hands of the original payee or an innocent endorsee. It is very true that the courts in England struggled hard to protect an innocent endorsee against the plea of usury, because of the obvious hardship of the case. They, however, did yield to the irresistible force of the reasoning upon this subject, and determined that a security, void by statute, as in the case of usury and gaming, was void in the hands of a *bona fide* holder, without notice. The security being *utterly void* by law, it could acquire nowhere, and in no way, any vitality. A transfer, for value, to one ignorant of the taint, could not breathe life into the contract. Void in the beginning, it was void forever, and everywhere. The other reason for this determination of the British courts is this: If a usurious contract could be enforced, in the hands of a third person, then it would

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be the easiest thing imaginable to defeat the statute of usury. The public policy of the laws against usury imperiously required such a decision. It was, consequently, made, and, for a long series of years, acquiesced in.—*Chit. on Bills*, 10th Am. ed. 86-7-8; *Lowe vs. Waller, Doug.* 736; 1 *Stark.* 385; 2 *Bar. and Ald.* 590; 8 *Price*, 288.

These decisions have been followed by similar adjudications in the United States.—3 *Johas. Cases*, 206; 1 *Bay*, 28; 1 *Greenleaf*, 167; 2 *Caine's Rep.* 150; 10 *Mass.* 121; 3 *Day's Rep.* 268. The law, as thus settled, was modified by statute, in England, first by the act of 58 *Geo.* 3, which protected a holder, *for value*, without notice. By statute of *William* 4, bills and notes given for usurious considerations are declared to be not void, but given for an illegal consideration. By act of 3 and 4 *William* 4, bills and notes not having more than three months to run, were exempted from the operation of the usury laws. This exemption, by 7 *William* 4, and 1 *Vict.*, was extended to bills and notes not having more than twelve months to run. And by 2 and 3 *Vict.* this exemption was extended to *all contracts*, for the loan of money, above ten pounds. And other provisions are likewise found in the same statute touching this matter.—*Chit. on Bills*, 87-8-9.

Thus we find that, at common law, as it stood in May, 1776, when we adopted it, all securities tainted with usury were void in the hands of innocent holders. And now, therefore, the common law upon this subject is the law of Georgia, unless our own legislation has repealed it. The statutes of England, referred to in repeal of the common law, are all repealed since the year 1776, and, therefore, not of force in Georgia.

It is argued by counsel for plaintiff in error, that the common law made void these securities in the hands of *bona fide* holders; because by statute, in England, such securities were declared *utterly void*; that our statute does not make the contract utterly void, and, therefore, the common law does not apply in this State; for, say they, *cessante ratione legis, cessat ipsa lex*. The difference between the English statute of usury and ours is this: their statute makes the whole contract void—ours makes the contract void as to legal and usurious interest. This court has so construed the act of 1839, in the case of *Winkler and Scudder*. The reason, therefore, of the common law applies here in all its force, so far as the interest is concerned. To the interest only do our pleas of usury apply, and we hold that they apply, whether the security be in the hands of the original payee, or an innocent holder, without notice.

It was argued by counsel for plaintiff in error, that the plaintiff in this cause, below, had no notice of the usury in the contract, and, therefore, no evidence could be admitted against him, under the plea of usury. The record does not show that he had express notice; nor is this necessary, to admit the defendant's plea. It is apparent on the record, that the plaintiff took this note and mortgage after it fell due. The learned counsel argued, that bills and notes are negotiable after as well as before they fall due; which proposition we do not controvert. He, however, claimed, that the only effect of the bill, or note, being over due, is to put the world, and, therefore, the holder, upon guard as to taking it. To this proposition we do not assent. The dishonor of the note, dishonors the world upon its guard; and, for that very reason, the holder is liable to all the equities between the original parties. T)

tion of law is, that there are equitable defences to a dishonored note, or bill, else it would have been paid at maturity. The fact, therefore, of dishonor is notice to the holder. He, generally, takes it on the credit of the person who gives it to him. The rule is laid down with great precision and perspicuity by Lord Ellenborough, in *Timson and Francis*, 1 *Camp.* 19, in these words: "After a note, or bill, is due, it comes disgraced to the endorsee, and it is his duty to make inquiry concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the endorser, and subject to all the equities with which it may be encumbered."—3 *T. R.* 82; 7 *T. R.* 431; 3 *T. R. n.* 483; *Doug.* 632; 6 *Bingh.* 109; 5 *Mass.* 299; 6 *ib.* 451; 3 *Johns. Rep.* 124; 7 *Johns. Rep.* 26; 4 *Greenlf.* 415; 3 *Wend.* 605; 12 *Wend.* 523; 8 *Conn.* 336; 10 *Wend.* 86.

In connection with this head of error, it is convenient to consider the last, which is as follows, to wit: The court declined to instruct the jury, that the defendant, knowing that the note was about to be transferred by N. H. Beal, did not notify the plaintiff that there was any usury to be plead against it, but represented to him that it would be fully paid, and therefore was not entitled to make this defence. The facts as to this point are as follows: N. H. Beal, being about to trade this note and mortgage to Bailey, sent for the defendant, and a conversation took place relative to them. The defendant was informed that Beal was about to transfer the securities to Bailey, and did not disclose that the note was usurious, but stated, in the presence of the plaintiff and Beal, that he did not like to be sued, and urged both of them to use their influence with the legatees, (for whom Bailey was then acting as agent,) to get him indulgence until the next fall or Christmas, when he would pay every dollar of the note, principal and interest. Nor did the witness, Beal, disclose the usury. Afterwards, and on the same day, the plaintiff took the note and mortgage. The doctrine asserted in the last ground of error, as founded upon these facts, we take to be this: If a party, by the willful suggestion of a falsehood, is the cause of a prejudice to another, who has a right to a full and correct representation of the fact, such party's claim ought to be postponed to that of the person whose confidence was induced by his representation; and there can be no real difference between an express representation and one that is naturally and necessarily implied from the circumstances. A party who enables another, too, to commit a fraud, is himself answerable for consequences. We recognize, in these propositions, sound law; they obtain, as rules in equity. For example, a man having a title to an estate offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and another is induced to buy, the purchaser's title is good. So one holding a mortgage upon an estate, stands by and sees the mortgagor execute another mortgage, without disclosing the existence of his own, his older mortgage lien will be superseded.—*Story's Eq. sec.* 384, 385; *Sugden on Vendors*, ch. 16; 6 *Johns. Ch. R.* 166 a 172; 1 *ib.* 354. Courts of law also act upon the same just and enlightened principles. Lord Denham, in *Pickard vs. Sears*, (6 *Adolph. and Ellis*, 474,) says: "The rule of law is clear, that where one by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from

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averring against the latter a different state of things, as existing at the same time."—9 *B. & Cres.* 586; 3 *Barn. & Ald.* 318, note (a); 14 *East*, 994; 1 *Story Eq.* 375, note. Applying the principles, under the facts in this cause, to the right of the defendant to plead, we have no hesitation in saying, that they would preclude him from setting up all defences, except the invalidity of the note by law. They would preclude him generally, but do not preclude him in this case; *because the defence of usury is founded on public policy, and no act or omission of the borrower, however fraudulent, can make valid a note declared by the law void on account of usury.*—*Blydenburg*, 87; 1 *Bulstrode*, 17; 3 *J. C.* 206. The case relied upon to sustain this ground of error, reported in 2 *Bailey*, 59, seems at first view to sustain it; but upon looking at it carefully, I find that it has really no relevancy to it whatever. It is a very brief report. The statement (and that is the whole case) is this: "Where the endorser of a note, made to raise money at usurious interest, represents to a purchaser that it is a business note, made for a *bona fide* consideration, and the maker is present and acquiesces, it is a fraud upon the purchaser, and both are liable. Yes, both are liable, but not on the note. They are both liable for the fraud, in the proper form of action. So here, it may be, (but as to that the court expresses no opinion,) that both Beal, the endorser, and Lumpkin, the maker, are liable to Bailey. We do not find any error in the record as to the two assignments last considered.

The 5th ground of error is, that the court charged that any payments of legal or usurious interest, made at any time previous, on prior renewals, must be deducted out of the sum originally loaned, and the balance was all the plaintiff was entitled to recover. In *Winkler vs. Scudder*, tried at Hawkinsville, this court determined this point, in accordance with the charge of the presiding judge in this case; we find no reason for reversing that decision.

The next error complained of is in this: that the court refused to charge the jury that the plaintiff, on the foreclosure of a mortgage, where the defendant sets up the plea of usury, is entitled to recover principal and legal interest. This exception assumes, that the plea of usury is analogous to a proceeding in equity on the part of the borrower to establish and escape from the usury. On such a proceeding, we admit, as already stated, that the borrower must do, before he can get, equity; that is, he must pay not only the lawful interest, but the principal. But this proceeding is not in equity, but in law. We have already undertaken to show, that under our act of 1799, the defendant is entitled to the plea of usury. But whether this proceeding be considered at law or in equity, in either case Bailey is the plaintiff; he is the moveant. The defendant is brought into court by a process sued out at his instance. Now, the rule is well settled, that where the lender goes into equity, or to a court of law, to enforce a usurious contract, he cannot recover either the legal or the usurious interest.—1 *Fonblanque* 190, note; 5 *John. Ch. R.* 136. See also this opinion on the first assignment.

We find but one more point made, for our consideration in this case, and that is, that the court declined to charge that the payments of interest, made on previous renewals, could not be deducted from the amount due on the note sued on; *because that was a note bearing interest, and therefore not usurious.* The facts are, that the n^o

on was in renewal of previous notes, tainted with usury; and that only a part of the interest reserved had been paid. It is also proven that the note in suit bore interest at eight per cent. only.

The infection of usury follows all the securities, however varied in form and amount, which may be afterwards given for the same debt.—*Blydenburg*, 98; 5 *Conn.* 184; 15 *Mass.* 96; 3 *J. C.* 206; 20 *Johas. R.* 285; 9 *Coven.* 647; 6 *Wendell*, 415.

The renewal of the last note, at only lawful interest, does not create an exception to the rule. If, upon a usurious contract, the whole interest, and part of the principal, is paid, and the debt is renewed at lawful interest, and that note negotiated, and itself renewed to the endorsee at lawful interest; it was held that the last note was not obnoxious to the statute of usury, in the hands of the endorsee.—10 *Mass. R.* 120. This case was relied upon, by counsel for plaintiff in error, in the argument. But its facts are very different from those of the case at bar. According to the testimony in this case, the usurious interest reserved had only been paid in part. The note sued on still covered, and was designed to secure, illegal interest. If the case from 10 *Mass. R.* be authority, it cannot help the plaintiff in error. Although the radical vice of a usurious contract attaches to and infects all future securities for the same loan, yet the contract may be purged. For example: if there is an accounting between the parties to a usurious contract, and all sums previously paid usuriously are deducted, and a new security given for the balance, the contract is said to be purged, and the last security taken is valid.—*Saunders' Plead. and Evid.* 898; 2 *Car. and Pay.* 397; 1 *R. and M.* 123 *S. C.*; 1 *Camp.* 165; 2 *Taunton*, 184.

There is no purgation in this case. We affirm the judgment of the court below.

No. 62.—ISAAC BROWN, plaintiff in error, vs. AQUILLA CHANEY, defendant in error.

Where A endorses a note to B, "to be liable only in second instance," and B sues C, one of the makers, who pleads a release from A, while the holder of the note, and is discharged by the judgment of the Justice's Court, that judgment is only *prima facie* evidence, at best, in a subsequent suit against A. To make it *conclusive* testimony of B's right to recover, notice to A of the first action was indispensably necessary.

Algernon S. Speer and Alexander Speer made six thirty dollar notes, payable to one William Hayman, or bearer, dated 16th of February, 1839, and due the 25th of December thereafter. Hayman transferred these notes to the plaintiff in error, who afterwards, on the 8th of February, 1842, endorsed them to the defendant in error, with the reservation that he was not to be liable in the first instance. The defendant sued Algernon S. Speer in the Justice's Court upon said notes, recovering said notes.

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ments therein on the 6th of January, 1844, upon which judgments executions were issued, and returned *nulla bona*, before the commencement of the suit by defendant in error against the plaintiff in error. Alexander Speer, the other maker of said notes, was also sued in the Justice's Court, who pleaded a discharge from liability on said notes (among other things), because the plaintiff in error, Brown, while the owner of said notes had given indulgence to the said Algernon S. Speer, who was principal in said notes, the said Alexander Speer being only the security; whereupon, in the Justice's Court, the court, and jury on the appeal, gave judgment and verdict for the said Alexander Speer. The defendant in error then commenced suit against the plaintiff in error, upon his said endorsement, in the Inferior Court of the county of Munroe, and which, on appeal, was tried in the Superior Court of said county, at March Term, 1846, before Judge Floyd.

Upon this trial the counsel for the defendant in error introduced, and read in evidence, the said six notes, and the said endorsement thereon of the plaintiff in error. Also, the judgments in the Justice's Court against the said Algernon S. Speer, and the return of *nulla bona* made on the executions issued therefrom, before the commencement of the suit against the plaintiff in error. Also, several witnesses were introduced, and proved the said Algernon S. Speer's general insolvency; and also *fi. fas.*, from the Superior and Inferior Courts against said Algernon S. Speer, with returns of *nulla bona* thereon. The counsel for the plaintiff in error also proved that the other maker, Alexander Speer, had also been sued in the Justice's Court on said notes, and that he had been released from further liability on said notes: first by the judgment of the Justice's Court, and secondly by a verdict of the jury on the appeal trial in the Justice's Court; which was proved by the introduction of the notes, and the entries thereon, and by the justice's docket, and the entries thereon, and which took place before the commencement of this suit. It was also proved, by the said Alexander Speer, a witness introduced by the plaintiff in error, that there was neither fraud nor collusion between himself and the defendant in error in the Justice's Court, and his counsel in procuring his said release in the Justice's Court, that was in his knowledge. The defendant in error here closed his case. The defendant's counsel then tendered in evidence the plea of the said Alexander Speer in the Justice's Court, and the interrogatories filed and read, in the Justice's Court, in support of said plea; which, being objected to, was rejected by the court below, upon the ground that the interrogatories taken in a justice's court could not be read as evidence in the Superior Court.

The counsel contended that the plaintiff in error was not concluded by the judgment of the Justice's Court, and that he might show that said Alexander Speer was not lawfully discharged from liability on said notes by the said verdict and judgment in the Justice's Court.

Whereupon the court below held that the Justice's Court, having jurisdiction of the parties to the suit in that court, and of the subject matter, their judgment was conclusive upon third persons, unless attacked for fraud.

To which decisions of the court below, the counsel for the plaintiff in error excepted.

By the Court—LUMPKIN, Judge.

The question for the opinion of this court is : what shall be the force and effect of the judgment rendered in the Justice's Court in favor of Alexander Speer, in the suit subsequently instituted by Aquilla Chaney against Isaac Brown? The court below was unquestionably correct in rejecting the testimony tendered by the counsel of Brown, to impeach that judgment, not because interrogatories, taken in the Justice's Court, could not be read in the Superior Court, but because that judgment could not thus be collaterally attacked : *Expediit reipublice ut sit finis litium*.

The peace and happiness of the community, as well as the respect due to the judicial tribunals of the country, alike require that this ancient maxim of the law should not be disregarded. But is the broad proposition maintainable, assumed by the circuit judge, that the judgment of this court was conclusive upon *third* persons, unless attacked for *fraud* or *collusion*? We think not. On the contrary, as a general rule, we hold the very reverse of this proposition to be true : namely, that a verdict cannot be evidence for either party, in an action against one who was a *stranger* to the former proceeding—who had no opportunity to examine witnesses or to defend himself, or to appeal against the judgment ; and this is a most obvious principle of justice.—*Paynes vs. Coles*, 1. *Mun.* 373 ; *Jackson vs. Vedder*, 3 *John. Rep.* 8 ; *Case vs. Reeve*, 14 *ib.* 78-S1 ; *Twambly vs. Henely*, 4 *Mass. Rep.* 441-2 ; *Wood vs. Stephen*, 1 *Serg't and Rawle*, 175 ; *Johnson vs. Bourn*, 1 *Wash. Rep.* 187 ; *Cowles vs. Harts*, 3 *Conn. Rep.* 516 ; 4 *Term. Rep.* 590 ; 2 *Price*, 434. Even for a judgment to be evidence at all, it must be upon the *same point*, and between the *same parties* or *privies*.—*Mayhee vs. Avery*, 18 *Johns. Rep.* 354. To the general rule thus laid down, there are several exceptions, to which we need not advert in the present discussion.

It may be material to inquire, in what relation did *Brown* stand to the suit in the Justice's Court between Chaney and Speer? Was he a party, or privy, or stranger? Under the term *parties*, the law includes all who are interested in the subject matter of litigation, who will be gainers or losers by its result, and for or against whom the record of the proceeding might be adduced in evidence in another trial ; those who have the right to be heard, and to offer testimony and examine the witnesses. *Privies* are those who are so connected with the *parties* in estate or in blood or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, as lessor and lessee, heir and ancestor, executor and testator : all others not included in either of these classes are, of course, *strangers*.

Now, it is apparant that Brown, who had endorsed the Speer notes, to be liable in the second instance, was deeply concerned in the controversy between Chaney and Alexander Speer. If the money could not be made out of the makers, recourse over would be had against him by the endorsee. For what purpose, then, was the Justice's Court's judgment admissible, and was Brown concluded by it? Like the judgments of all other courts, being a public transaction, rendered by public authority, and being presumed to be faithfully recorded, it was admissible to prove the fact that such a judgment was rendered. But in the absence of notice to Brown, that it was not conclusive evidence to establish the fact of the

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release of Alexander Speer. Whether it was evidence at all of the fact upon which the judgment was founded, namely: the discharge of A. Speer, unless Brown had been notified of the defence, is exceedingly doubtful; but as no objection was made by defendant's counsel to the competency of this testimony, we will waive any further investigation upon that point.

Kip against Brigham and others, (6 *Johns. Rep.* 158,) was an action brought by the sheriff of Oneida county, against the defendants on a bond given as security for the jail liberties granted to the defendant, Abel Brigham, who had been arrested and imprisoned on a *ca. sa.* at the instance of John Bissell. At the trial, the sheriff gave in evidence the record of a recovery against him in favor of Bissell, for the escape of the defendant, Brigham; that, immediately after the suit was commenced against the plaintiff, he gave notice thereof to the defendants, and the suit was regularly defended by the plaintiff, aided by the active co-operation of the defendant's counsel. The judge ruled, that the record of the recovery in that suit was conclusive against the defendants in this suit, unless they could show fraud or collusion between the plaintiff and Bissell; and he rejected evidence offered by the defendants, to controvert the fact of the escape; and very properly ruled, that after notice to the defendants, and their assuming the defence, the recovery was conclusive that the sheriff had been damnified to that extent.

In the case of the State of Ohio, for the use of *Fulton & Co. vs. C. Colerick*, late sheriff and others, (3 *Ohio, Rep.* 487,) a judgment against the sheriff, for a false return on an execution, was offered in evidence, on the proceeding to assess the damages against his securities, and objected to by them as inadmissible. The court say: "We take the distinction to be, that where the securities have notice of the suit, and may or do make defence, the judgment against the principal is conclusive against them. Where such notice is not given, the judgment against the principal is *prima facie* only. It may be impeached for collusion or mistake, but until so impeached, it is sufficient to entitle the plaintiff to recover the amount for which it is rendered."—See *Commissioners of Brown vs. Butt*, 2 *Ohio, Rep.* 347.

Burrell vs. West, Jr. (2 *N. H. Rep.* 192,) was an action of assumpsit founded upon a promise, made by the defendant, to indemnify the plaintiff, a constable, for making sale of a chattel upon a writ of execution in favor of the defendant, against one W. West. The amount of the defendant's undertaking, (says the judge's report of the facts,) was to save the plaintiff harmless from the claims of all persons having a better title to the chattel than that of the debtor. The plaintiff produced in evidence the record of a judgment, by which it appeared that one Joshua Ames had recovered, against the plaintiff, damages and costs in an action of trespass, for taking the chattel in question. Chief Justice Richardson says: "A verdict or judgment in a former action upon the same matter directly in question, is evidence, not only for or against the parties to the suit, but for or against privies in blood, privies in estate and privies in law. But neither a verdict nor judgment can, in general, be evidence for either party in an action against one who was a stranger to the former proceeding, and who had no opportunity to examine witnesses or defend himself. It is not necessary that he, against whom a judgment is to be used as evidence, should have been actu-

party to the suit in which it was rendered; but in general, notice of the suit and opportunity to be heard seem indispensable to make the judgment evidence."

In the case of *Hamilton vs. Cutts, et al. Exrs.* (4 Mass. Rep. 352,) Parsons, C. J., held, that an eviction by force of a judgment at law, with notice of the suit to the warrantor, the judgment itself would be plenary evidence, in an action of covenant broken, unless impeached for fraud.

In *Clark's Exrs. vs. Carrington*, (7 Cranch Rep. 322,) Chief Justice Marshall thought, that in such a case, a judgment against a person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit on the contract of indemnity.

In *Bond vs. Ward*, (1 Nott and McCord, Rep. 202,) Mr. Justice Johnson, who delivered the opinion of the court, says: It is unnecessary to the determination of this case, to enter into the general consideration of the question, whether notice is or is not necessary, where a recovery over is given by law, or secured by express contract. It is sufficient, and so I take the rule to be, that whenever the plaintiff relies upon a recovery against him, as the sole and conclusive evidence of his right to recover over, notice is indispensably necessary.

This whole doctrine is elaborately examined, in the case of *Munford and others vs. Overseers of the poor of Nottoway*, (2 Rand. Rep. 313,) and the following are some of the conclusions arrived at by the court: "The general rule is, that verdicts and judgments bind, conclusively, parties and privies, because privies in blood, in estate and in law, claim under the person against whom the judgment is rendered; and they, claiming his rights, are of course bound as he is. But as to all others, they are not conclusively binding, because it is unjust to bind a party by any proceeding, in which he had no opportunity of making a defence, of offering evidence, of cross-examining witnesses, or of appealing, if he was dissatisfied with the judgment. And this is called by the court, in *Burke vs. Granberry*, a 'golden rule.'"—*Gilmer's Rep.* 25. The following general doctrines have been established upon this head: In an action by the vendee of personal property against the vendor, upon a warranty of title, a judgment obtained against the vendee by a third person, claiming to be the rightful owner, in a suit of which the vendor had no notice, cannot be given in evidence to prove that the latter had not title.—*Stevens vs. Jack*, 3 Yerg, Rep. 403; *Saunders vs. Hamilton*, 2 Hayw. Rep. 226; *Jacob vs. Pierce*, 2 Rank Rep. 204.

And where the assignee sued the assignor of a chose in action, held that a verdict and judgment in favor of the maker at the suit of the assignee, in which the jury found that the demand assigned had been paid previous to the assignment, could not be given in evidence to prove the fact thus found, unless the assignor had due notice of the action, and an opportunity to meet the defence there set up.—*vs. Compton*, 3 Bibb, 214; 3 Phil. on Ev. 817. The judgment would be evidence to prove the fact of due diligence.—*ibid.* 215.

So, where the endorsee of a note sued the maker, and failed because the consideration was usurious, held, that the verdict and judgment were not evidence for the endorsee, in an action against the endorser, (who was also the original payee,) in order to establish the usury.—*Copp vs. McDugall*, 9 Mass. Rep. 1-4. The record is proof of the proceedings and judgment, and nothing more.—*ib.* The case of principal and

security, is more favored than that of any other parties, not being considered within the rule of *res inter alias acta*. And where the surety, being sued for the default of the principal, gives him notice of the pendency of the suit, and requests him to defend it, if the judgment goes against the security, the record is conclusive evidence for him, in a subsequent action against the principal for indemnity; for the principal has thus virtually become party to it.—1 *Green. on Ev.* sec. 188. But suppose the security fail to give the notice, and the maker can prove that he has discharged the debt, would he be precluded by the judgment from his defence? *Cowen and Hill*, in their notes on *Phillips*, deduce this as the result of an extensive research into the authorities; where a party has the right of recovery over secured to him, either by operation of law or express contract, and he has given the person responsible due notice of the suit, the judgment, if obtained without fraud or collusion, will be conclusive evidence for him, against such person, upon any fact established by it. The latter cannot be viewed in the light of a mere stranger, because he has the means of controverting the adverse claim, as though he were the nominal and real party on record.—3 *Phil.* 817.

After this rapid survey of a few of the leading authorities, can it be seriously urged that a judgment of a court is conclusive upon third persons, unless impeached by fraud or collusion? Brown was not liable *ipso facto* upon his endorsement. Chaney had first to exercise due diligence, to make the money out of the original debtors. His judgment in the Justice's Court was conclusive, that he resorted to the proper means to collect the money out of the parties primarily liable. But in this attempt he is met by a plea, from one of the joint makers, who claimed to be security only, that Brown, while the holder of the notes, had, without his privity or consent, given indulgence to the principal, and that consequently he was released from further liability. Ought not Brown to have been notified of this defence? And failing to do so, can Chaney give the judgment of release in evidence against Brown? At any rate, shall not Brown be allowed to controvert the fact established by it? We are satisfied that he had the right, and that the court erred in precluding him from its exercise, in the opinion which it expressed, as to the effect of this judgment. It would be a gross violation of the great principles of justice, to say nothing of the modern practice of all civilized nations, to deprive a citizen of life, liberty or property unheard. Formerly, a recovery on a guardian's, administrator's, sheriff's and other official bonds, was held *conclusive* in a suit against the securities. But this doctrine is almost universally exploded. In some of the States, it is still allowed as *prima facie* evidence of the amount of damages.—*Baker vs. Preston*, *Gilm.* 235; *Jacobs vs. Hill*, 2 *Leigh's Rep.* 393. But in others it is rejected altogether, as inadmissible for the plaintiff.—*McKeller vs. Howell*, 4 *Hawks' Rep.* 34; *Respublica vs. Davies*, 3 *Yeates' Rep.* 128. But to hold that a judgment is conclusive upon third persons, would be to overturn a uniform course of decisions from the Year Books to the present day.

In conclusion, we are all the opinion, and so award, that the judgment below is erroneous, and must be reversed, and a new trial ordered.

AMOS W. HAMMOND, for plaintiff in error, submitted the following authorities:

Gilbert Ev. 32; 2 *Campbell*, 21; 2 *Car. and Payne*, 345; (12 *Eng. Com. Law Rep.* 161;) 4 *Phillips*, notes 557, 569, 803, 815, 821; text 1 *Phillips*, 326; *ib.* 321, Note 557; 1 *Douglass*, 40. A *fi. fa.* is not evidence, because the person against whom the *fi. fa.* issued is not the party here.—*Dudley Geo. Rep.* 65, 193, 194; 7 *Cranch*, 271; 1 *Wheaton*, 6; 1 *Greenleaf Ev.* 220, 587, note 3, sec. 88, 577, 538, 539; 1 *Starkie Ev.* 191 and note; 1 *Russell*, 395; *N. C. Term Rep.* 186.

L. T. DOYAL insisted that the remedy of the plaintiff in error would have been by writ of *certiorari* to reverse the judgments in the Justice's Court, if they were irregular or illegally obtained, as alleged. Though not a party to the suits in that court, he was materially interested. The authorities clearly establish the principle, that any one whose interest is materially affected by an irregular proceeding, may apply to have the judgment reversed.—*R. M. Charlton. R.* 455; 8 *Greenleaf Rep.* 292; 10 *Mass. Rep.* 64; 11 *ib.* 379; *N. C. Term Rep.* 184; 2 *Evans' Pothier*, 353; 1 *Hargrave's Law Tr.* 468; 3 *Ed. Phillips Ev.* 276; 1 *Starkie Ev.* (note) 236; 2 *Swift's Dig.* 70; 3 *Tomlin's Law Dic.* 218.

2d. That a judgment of a court of competent jurisdiction cannot be impeached, except for fraud.—1 *Ves.* 150; 1 *Stark Ev.* 108, 210, 211, 212, 215, 241, 242, 236; 1 *Greenleaf Ev.* 668, 569, note, and cases there cited.

3d. The court below committee no error in rejecting the parol testimony offered to prove the proceedings in the Justice's Court. The record was higher evidence, and should have been produced.—*Greenleaf on Ev.* 83, 84, 85.

NO. 63.—AMOS W. HAMMOND and JOSIAH G. JORDAN, plaintiffs
in error, vs. CASWELL BUYS, defendant in error.

A note given by way of renewing and continuing an *original contract* for a usurious loan, the mere change of securities would not purge it of the usury.

But if A, as the maker of a usurious note, is about to pay it up to B, the payee and holder, and C, for the purpose of using the money for *his own benefit*, borrows A's note from B, and gives B his (C's) own note with A, as his security—there being no usury in the transaction between B and C—the note of C, with A, security, thus substituted, would not be obnoxious to the statute of usury.

AMOS W. HAMMOND, for the plaintiffs in error.

J. S. PINCKARD, for the defendant in error.

This was an action upon two promissory notes—one for \$672 and the other for \$107 64—tried, on the appeal, in the Superior Court, in the county of Monroe, at March Term, 1846, before Judge Floyd. The plaintiffs in error, who were the defendants below, pleaded *usury*

as to both of said notes ; and an additional plea, of partial failure of consideration, as to the small note. The notes sued on, having been read in evidence in behalf of the defendant in error, who was the plaintiff below, he closed his case.

The facts proven by the plaintiffs in error, not having been set forth in the bill of exceptions, nor otherwise certified to this court in conformity with the rules of court, the charge of the court below was alone looked to, in the adjudication of the questions of error made in this case.

After argument of counsel, the judge of the court below charged the jury, that although there was usury in the original contract of loan from defendant in error to Russell and Jordan, and that the note endorsed by Chewning, having been given in renewal of that note, was likewise usurious ; yet, if the jury believed from the evidence that Jordan paid Hammond, either in property or money, to take up the note on Jordan and Russell, endorsed by Chewning, and that, in fulfillment of the contract between Jordan and Hammond, he, Hammond, gave to the defendant in error the notes sued on—there being no usury alleged in the transaction between Jordan and Hammond—they should find for the defendant in error : for the consideration of these notes was a distinct and independent contract ; and the fact that Jordan signed Hammond's notes, did not so connect that transaction with the original usurious contract of loan, from defendant in error to Jordan and Russell, as to contaminate these notes. The jury thereupon rendered a verdict for the whole amount of said notes, with interest and costs. To which charge of the court below, the plaintiffs in error excepted, and allege, in their assignment of errors, that the same was and is manifestly erroneous in law.

By the Court—WARNER, Judge.

As the facts in this case do not appear in the record, it is impossible for us to ascertain on what statement of facts the court below predicated its charge to the jury. If the note sued on was given by way of renewing and continuing the *original contract* for a usurious loan, then, the mere change of securities would not purge it of the usury.

But, if Jordan was about to pay up the note to the defendant in error ; and the plaintiff in error, for the purpose of using the money for *his own benefit*, went and borrowed it of the defendant, Buys, while in the hands of Jordan ; and made a *new contract* for the loan of it, for his benefit, which was not usurious, and gave his own note therefor, with Jordan as his security ; it would not, in our judgment, be obnoxious to the statute of usury. What was the true statement of facts, we are not informed by the record : therefore, let the judgment of the court below be affirmed.

**No. 64.—The MERCHANTS' BANK OF MACON, plaintiff in error, vs.
The CENTRAL BANK OF GEORGIA, defendant in error.**

If a person, assuming to act as the agent of a corporation, but without legal authority, makes a contract, and the corporation receive the benefit of it, and use the property acquired under it, such acts will ratify the contract, and render the corporation liable thereon.

In the execution of instruments under seal, by an agent, the general rule is, that it must purport, upon its face, to be the contract of the principal, and his name must be inserted in it, and signed to it.

In the case of instruments not under seal, executed by agents, if it appear from the face of the paper, that the credit was not given to the agent, and the name of the principal was disclosed at the time of the transaction, and the act was within the power of the agent, the principal is bound. Upon such contracts, where the interest is not sufficiently clear that the principal was to be bound, the defect may be supplied by parol testimony.

The clause, to be found in most of the bank charters in Georgia, which provides that the funds of the company shall in no case be liable for any contract or engagement: whatever, unless the same shall be signed by the president, and countersigned by the cashier, of the corporation, does not apply to such contracts or engagements as occur, or are necessary to the ordinary business of a cashier or agent; such as drawing and endorsing bills of exchange, checks and drafts—acts which appertain according to commercial usage, to the office of a cashier.

A general power to discount bills of exchange, confers on the agent the power to endorse.

In a suit by the Central Bank, no proof of notice, demand, or protest, is necessary to charge the endorser.

In a case where the holder of an endorsed paper fails to give notice of the dishonor, where notice is necessary to charge the endorser, and the endorser is therefore released in law, and the holder then transfers the paper to the Central Bank, and the endorser is sued: although on the trial the bank is not bound to prove notice, demand, or protest, yet the endorser would be let into his defence, and by proof would be permitted to show his discharge for want of notice.

This was an action, brought by the defendant in error against the plaintiff in error, in the Superior Court of the county of Bibb, upon a bill of exchange drawn by Jerry Cowles upon the Fulton Bank of New York, addressed to the cashier thereof, bearing date the 10th of January, 1842, whereby the said Cowles requested the Fulton Bank of New York to pay Scott Cray, agent, or order, ninety days after the date thereof, five thousand dollars for value received, and charge as advised.

Acceptance was waived, and the bill was endorsed by Scott Cray, agent. The declaration also contained the common money counts. The principal of Mr. Cray was not disclosed, either in the bill itself or in the endorsement. It was discounted by the Central Bank of Georgia, in renewal of a former bill for the same amount, and drawn and endorsed by the same parties. It was afterwards presented to the Fulton Bank of New York for payment, and was dishonored. It was alleged in the declaration, that the said Scott Cray received the said bill, and endorsed the same to the Central Bank, as the agent of the Bank of Hawkinsville, the name and style of which was afterwards altered and changed.

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by act of the Legislature of Georgia, to that of "The Merchants' Bank of Macon," and by that name and style the said corporation was declared to be subject to all the penalties and liabilities to which it was subject under the former name of "The Bank of Hawkinsville."

This cause was tried on the appeal in the court below, before Judge Floyd, at May Term, 1846.

It was proven on the trial, by the books of the Bank of Hawkinsville, that said Scott Cray had been appointed agent of said bank, to transact at Macon, a legitimate *business* for said bank, with the power and privilege of discounting notes, and drawing and discounting bills of exchange; and that bills were sent him, from time to time, to bank upon, and for the purpose of discounting bills on Savannah, Charleston, and New York. It was proven by the testimony of the cashier of the Central Bank, A. M. Nisbet, Esq., that this bill was discounted by the Central Bank, in renewal of a former bill for the same amount, and drawn by the same parties, under the authority of the act of 1838, for the purpose of paying interest on sterling bonds of the State of Georgia, held by Messrs. Reid, Irving and Company, of London, and by the Bank of Augusta. That said Scott Cray received the proceeds of the original bill in cash, and acted in the matter, as witness understood, as the agent of the Bank of Hawkinsville.

The counsel for the defendant in error then offered to read in evidence the said bill of exchange, to which the counsel for the plaintiff in error objected, on the following grounds:

1st. That said bill was not evidence to bind the plaintiff in error, who was sought to be charged, for and by the act of a supposed agent, while the name of the principal nowhere appeared on said instrument.

2d. That the bill was not evidence against the plaintiff in error, because the endorsement was not signed by the president, and countersigned or attested by the cashier, as required by the 8th section of the charter of the Bank of Hawkinsville, before its funds could be bound for any contract or engagement whatever.

3d. That said Scott Cray exceeded all the powers conferred, and all the powers of a general agent, by endorsing said paper; the said paper never having been the property of the plaintiff in error, as was disclosed by the proof.

4th. That the bill was an *illegal* paper: both the defendant in error in receiving, and said Scott Cray (if he was agent) in passing it, violated the act of 1837, called the post-note law.

5th. That the said bill was not evidence, until or before demand and notice to the plaintiff in error had been proved. All of which objections were overruled by the court below, and the counsel permitted to read said bill in evidence to the jury.

The said Scott Cray was then introduced as a witness in behalf of the plaintiff in error, and it was proven by him that he was directed by Mr. John Rawls, President of the Bank of Hawkinsville, to procure to be discounted by the Central Bank, a draft for \$8,500, for the use of the Bank of Hawkinsville, drawn by John Rawls upon Charles Hartridge, Savannah, and endorsed by H. H. Tarver. The Central Bank not wanting funds in Savannah, refused to discount it. Mr. Jerry Cowles was in Milledgeville; and in a conversation with him, stated to witness, that he

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(Cowles) had Hull and Smith's New York letter of credit, authorizing him to draw for a large amount, and proposed to witness that he (Cowles) would draw on them for \$10,000 for the use of the bank, and the witness should endorse his (Cowles') draft for \$5,000 for his own use, to pay his debt to the Hawkinsville Bank, and for him to draw the balance. Witness informed Dr. Fort, President of the Central Bank, that he did not feel authorized—that he had never endorsed such a draft before out of bank. The two drafts were discounted, and the proceeds were paid to witness by the cashier of the Central Bank. Witness returned with the money to the agency of the Bank of Hawkinsville in Macon, where Mr. Rawls was awaiting his return, and informed him what had been done, and that he had the money, and if he (Mr. Rawls) did not approve of it, the witness would return the money to the Central Bank, and take up the draft. Witness testified that he would have done so, as he was determined to run no risk; and it was remarked that Mr. Cowles owed the bank two-thirds of the amount of said draft, which was a bad debt. Mr. Rawls, as president of the bank, approved the act of witness—the money was paid into bank, passed to Mr. Cowles' credit, and used for the redemption of the notes of the bank. A few days or weeks afterwards Mr. Cowles had a settlement with the bank, and his note for about two-thirds of the net proceeds of the \$5,000 draft was satisfied, and the balance was paid to him.

The counsel for the defendant in error then introduced, and was allowed to read in evidence, the testimony of the notary public of New York, taken by commission, testifying that he protested the bill sued on, and gave due notice. No protest was produced. To which testimony of the notary public the counsel for the plaintiff in error demurred, on the ground that the bill sued on being a *foreign bill*, a protest was necessary; and that the original protest must be produced or accounted for. These points were also overruled by the court.

To which the plaintiffs in error excepted.

JOHN RUTHERFORD, for the plaintiff in error, maintained,

1st. That the court erred in admitting the bill of exchange in evidence, because the name of the *principal* (the Merchants' Bank of Macon) ~~was~~ *where appeared on the paper*; and cited 10 *Wend. Rep.* 271; *Bayley on Bills*, 74, 69; *Chitty on Bills*, (8th ed.,) 37, 254; also, 16 *Mass. R.* 44-6; 11 *ib.* 29; also, *Story on Bills*, 91; *Story on Agency*, 147, 155, 275-8; *Bayley on Bills*, 69-74; also, 2 *Kent Com.*, sec. 41, page 63-1-4; *Mass. Rep.* 595; 13 *Johns. R.* 307; 2 *Stra.* 955; *Com. Dig. et.* (c. 14, 15,) and notes.

2d. The court erred in admitting the paper, because it was not signed by the president and cashier as required by the charter—*Prim. Dig.* 108; 2 *Cranch R.* 156, 166-7; 12 *Wheat.* 64-9; 13 *Peters*, 567; 5 *Hill's N. Y. R.* 16, 20; *Angell and Ames on Corp.* 242, 166, 212, 167, 243; 12 *Serg. and Rawle*, 256; also, 17 *Mass. Rep.* 26; 4 *Hill's N. Y. Rep.* 447; 2 *Kent. Com.* 465; 2 *Stra.* 955-6; *Angell and Ames on Corp.* 180.

3d. Scott Cray exceeded all powers of a general agent, and Mr. Rawls could not sanction, so as to bind the bank; the evidence showing that the bank did not receive the benefit of the money, so as to be chargeable

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on the money count.—*Chitty on Bills*, (8th ed.,) 34; 1 *Taunt.* 347; *Chitty on Bills*, (8th ed.,) 254; 1 *East R.* 422; *Angell and Ames*, 177-8; 17 *Mass. R.* 505; 10 *ib.* 397; *Angell and Ames*, 246; 6 *Pet.* 51; 8 *ib.* 16; 1 *Greenl. Rep.* 81; 17 *Mass. R.* 1; 14 *ib.* 58; 17 *ib.* 479; 18 *ib.* 215. The bill is not evidence under the money count.—*Story on Bills*, 515; 1 *Conn. R.* 409.

4th. The court erred in admitting the bill, because it was passed by S. Cray, and received by the Central Bank, in violation of the "post-note" law of 1837.—2 *Hill's N. Y. R.* 241; 7 *Wend.* 31; 3 *ib.* 583; 2 *Con. R.* 678; *Angell and Ames on Corp.* 198; 19 *Johns. R.* 1; 8 *Cowen*, 20; 15 *Wend.* 412; 24 *ib.* 24.

The general rules of illegal contracts.—*Chitty on Con.*, new ed., 637, 695, 419; 10 *Bing.* 107; 5 *Johns. R.* 326; 2 *Kent. Com.* 364; 13 *Ves.* 581; *Dudley's Geo. R.* 250; 3 *T. R.* 266.

5th. And lastly, the court erred in not withdrawing from the jury the testimony of the New York notary, proving demand, protest and notice; because nothing but the *original* protest can prove a protest on a foreign bill. As to its being a foreign bill, see *Bayley on Bills*, 21, and notes. Protest necessary.—*Chitty on Bills*, (8th ed.,) 489, 509; 4 *Harr. and Johns.* 54; 2 *T. R.* 713; 5 *ib.* 239; 9 *Porter Ala. R.* 131.

CHARLES J. McDONALD, for the defendant in error.

It is necessary, in reviewing the decision of the court below, which is brought up by the bill of exceptions, to look into the state of the pleadings.

There are two counts in the declaration—one a special, the other a common count. In the special count, there is no averment of a notice to the endorser, though there is an averment of a demand upon the drawer, and his refusal to pay.

The first exception is founded on the decision of the court below, in overruling the objection, that the name of the principal nowhere appears on the instrument.

That the paper was payable to Scott Cray, as agent, appears on its face, and his endorsement is as agent. It appears, then, from the bill of exchange itself, that it was *not* his individual business, and that he had a principal. The testimony from the books of the Bank of Hawkinsville shows that he was the agent of the Bank of Hawkinsville; and the testimony of A. M. Nisbet, the cashier of the Central Bank, proves that the money arising upon the discount of this paper, or one made by the same parties, in renewal of which the present paper was given, was paid to Scott Cray, as agent of the Bank of Hawkinsville. If this was given in renewal of a former paper, the proceeds, passed to the credit of the Bank of Hawkinsville, as the last endorser, could be drawn by its check only, and was applied to the payment of its liability on the former paper. Hence the proceeds, having gone to the credit of that bank, and applied as above, and the bank having had the benefit of the contract, it is liable, at any rate, on the common count. Such would have been the case if Cray had assumed to act as agent, but without legal authority.—*Epis. Charitable Society vs. Episcopal Church in Needham*, 1 *Pick. Rep.* 372; *Angell and Ames on Corp.* 2d ed., 178; 7 *Cranch*, 299, *Bank of Columbia vs. Paterson*; *Randall vs. Vanvetchen*, 19 *Johnson's Rep.* 60; *Story*, 298, 299. But in this case the agent had the most ample author

ity, and the objection is, that the name of the principal nowhere appears on the bill. The principal is liable, though his name does not appear on the instrument.—3 *Hill's R.* 72. I am aware it has been held, that the principal could not be bound at law, unless his name appeared on the face of the instrument, and that authority to this fact is to be found in *Chitty on Bills*, but the principal has always been held to be liable in equity, and also on the common counts. The doctrine on which these cases depend has undergone a very full consideration in the Court of Exchequer, in the case of *Higgins vs. Senior*, reported in 8 *Meeson and Welsby*, 440, and it was decided that though the principal was not named, parol evidence was admissible to charge him. The distinction seems to be, that parol evidence may be admitted to introduce a new party, but never to discharge an apparent party to the contract.—*Jones vs. Littleale*, o *Adolphus and Ellis*, 486.

This doctrine is maintained by Mr. Story, and cited by him with approbation.—*Story on Agency*, 190, 191, 334–5–6. This rule should be enforced, particularly in the case of notes and checks issued or endorsed by banks through their cashiers. These officers never sign the names of the corporations, whose agents they are. They uniformly sign their own names, and annex the character, "cashier." The checks usually, it is true, have on their face the name of the bank to which the cashier belongs.

It is, however, no part of the obligatory part of the check. The notes endorsed by cashiers frequently have no place of payment on their face. It would be ruinous if the banks were not liable, under such circumstances, on the contracts of their agent, executed under his official authority. This rule, in its rigor, for the benefit of commerce, is not held to apply to commercial transactions; and, indeed, may now be considered as confined to solemn instruments under seal.—*Townsend vs. Cornell*, 23 *Wendell*, 440,

The money arising from the discount of the bill of exchange, even if the bill and its endorsement had been contrary to law, having been paid to the Bank of Hawkinsville through its agent, the Merchants' Bank is liable, and the endorsement is proper evidence to charge it on the money counts.—*Utica Ins. Comp. vs. Kip*, 8 *Cowen's Rep.* 26; *Utica Ins. Comp. vs. Bloodgood*, 4 *Wendell*, 654.

The second ground of objection is, that the bill is not evidence against the defendant, because it is not signed by the president and countersigned or attested by the cashier, as is required by the 8th section of the charter of the Bank of Hawkinsville.

This section declares, that the funds of the corporation shall in no case be liable for any contract or engagement whatever, unless the same shall be signed by the president and countersigned or attested by the cashier of the corporation.—*Prince*, 108.

It is contended that, under this section, the bank is not liable for the act of its duly appointed agent. This act of incorporation, like all other laws, is subject to interpretation. And can it be so interpreted as to carry into effect the intention of the Legislature, protect the community, and secure the rights of the corporation? It can. It never was the purpose or intent of the Legislature to enable banks to sell their cashiers' checks to immense amounts, free from responsibility for their eventual payment. It was not its purpose to exempt banks from liability upon their secur-

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ties, endorsed away by their cashiers. This construction has been given by the banks and the community to bank charters, and they have uniformly, except in cases of insolvency, promptly redeemed dishonored cashiers' checks and endorsements.

This provision is not peculiar to the Merchants' Bank of Macon.—See *charter of Bank of Augusta* sect. 33, *Prince* 54;

Planter's Bank, ...	rule 12th,	<i>Prince</i> 60
State Bank, ...	" 11-	" 65
Bank of Darien, ...	" 11	" 69
Bank of Columbus, ...	" 11	" 86
Farmers' Bank of Chattahoochee, ...	" 11	" 93
Mechanics' Bank of Augusta, ...	" 11	" 96
Commercial Bank at Macon, ...	" 11	" 101
Insurance Bank of Columbus, ...	" 7	" 105
Bank of Milledgeville, ...	sect. 9	" 111
Ocala Bank, ...	rule 9	" 122
Planters' and Mechanics' of Columbus, ...	sect. 8	" 127
Western Bank, ...	" 12	" 130
Bank of St. Mary's, ...	" 10	" 135

Hence, it will be seen, that all the principal bank charters of the State of Georgia have the identical provision which the Merchants' Bank of Macon sets up as a bar to the recovery of a just debt.

The appointment of a cashier vests him with authority to do everything which is incident to his office; or, in other words, with all the *ex officio* powers of such an officer, in as full and ample a manner as if he were invested by written power, or resolution of the board, with such powers.

The cashier of a bank is, *virtute officii*, intrusted with the notes, securities and other funds of the bank, and is held out to the world as the general agent of the bank, in the management, negotiation, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and endorse negotiable securities held by the bank, for its use and in its behalf.—3 *Mason's C. C. Reports*, 506. In the case here decided, *Wild vs. The Bank of Passamaquoddy*, the bank was held liable on the cashier's endorsement. The banks of this State have never construed their charters otherwise. The true construction of this act, then, I contend, excludes from the operation of the clause relied on, all checks drawn and endorsements made by the cashier under his *ex officio* authority, and the prohibitory part of the section, which it will be remarked is introduced by the way of *proviso*, applies only to such contracts as are not necessarily connected with the exclusive duties of the cashier.

I am an advocate for construing acts of the General Assembly according to the words used in the act, as most likely indicating the intention of the Legislature, unless absurd and grossly mischievous and unjust consequences will follow, which demonstrate that the letter of the statute embraces cases not included within the purpose and intent of the act: then, I am equally an advocate for a departure from a strictly literal construction.

This departure is authorized.—*The People vs. Utica In. Co.* 15 *Johns. Rep.* 380. By no other construction, can the rights of all parties be protected. By this construction, they can be preserved.

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The cashier, for the faithful execution of the duties which belong to his office, and for his general fidelity, gives a bond, with security to the bank. This does not inure to the benefit of the community, but it effectually guards the bank against loss by the misconduct of its officer. The cashiers of our banks are daily checking and endorsing in their own names, as cashiers, without the signature of the president; and this with the knowledge of the president, directors and company of the banks.

The public give faith to these, at least apparently, authoritative acts, and deal with them; and the corporations permit their officers thus to deal, and approve their acts by passing their accounts.

Again: give the clause the interpretation for which plaintiff in error contends, and there would be no responsibility on any implied undertaking; for the literal construction of the terms, "any contract or engagement *whatever*," would apply as well to implied, as express contracts or engagements. An implied contract or engagement is some contract or engagement. The bank then would not be liable for deposits, for overpayments, for mistakes, or even for money awarded by the directors to customers on notes discounted. For these are all contracts or engagements of some kind. But in the case under consideration, the endorsement is made by an officer appointed by resolution of the board of directors, with most extraordinary powers—not only such as are ordinarily exercised by a cashier, but by cashier and board of directors jointly. He is authorized to *draw* and discount *bills of exchange*. To draw a bill of exchange, and to discount it when drawn, or, in other words, to have it discounted, is an authority which was doubtless given to enable the agent at Macon to borrow money to relieve itself in its days of great embarrassment, and this power was unquestionably exercised by the agent and for the objects contemplated by his constituent, when he borrowed the money from the Central Bank, on his endorsement. Power to discount includes the power to endorse.—*Story on Agency*, 73. He was vested with authority to discount as well as to draw. But the ground of error is, that the endorsement was not signed by the president and countersigned by the cashier. It was admissible under the money count, if not under the special count, (*Mechanics' Bank vs. The Bank of Columbia*, 5 *Wheaton*, 334,) and that though it was illegal.—8 *Cowen*, 25; 4 *Wend.* 624.

3d. The third ground of objection is, that Scott Cray, the agent, exceeded all the powers conferred, and all the powers of a general agent, by endorsing this paper; the counsel contending, that it does not appear from the evidence that the bill of exchange ever had been the property of the plaintiff in error.

It is wholly immaterial whether the paper ever had been the property of the plaintiff in error or not. Its agent endorsed it and drew the money on it, and, it is to be inferred, offered it for discount. But if the question of property were material, it was a question of fact, and not of law, and it was proper, from the facts testified to by the cashier of the Central Bank, that the paper should have been submitted to the jury. If the jury found, contrary to law, on this point, or contrary to evidence, the party ought to have moved for a new trial.

4th. The fourth ground is, that the bill of exchange was issued in violation of the post-note law, and is therefore not recoverable.

The 1st section of the act of 1837, (*Pamphlet*, 191,) prohibits the issuing or passing, &c. any bank-bill, note, check, draft, receipt, instrument under seal, or any chose in action, intended, designed or fitted for circulation, instead or in character of either, which shall be payable at a greater length of time than three days after the date.

The 2d section is pretty much in the same terms, with the difference that, instead of prohibiting the payment after date, it prohibits the issuing paper, payable in anything but gold or silver at the standard value.

The 4th section expressly declares that it shall not apply to bills or checks issued for the ordinary purpose of exchange.

5th. The fifth ground of exception is, that plaintiff has proven no demand of payment of drawee, and notice of protest. The action is in favor of the Central Bank of Georgia, whose charter declares, that all suits commenced by said corporation, upon any note, bill, bond, obligation, upon which there shall be any endorser or endorsers, &c. &c.; and no proof of notice, demand or protest, shall be required on any trial, to authorize a recovery, (sec. 26.)—*Prince*, 75. Section 20, which has been considered as applying to notes payable at the bank, but which, I question not, applies, or was intended to apply, to all papers, contains the same provision, and manifests the strong desire of the Legislature to hold the parties liable at all events. The capital of the bank having been constituted of the funds of the State, and the bank being entitled to the custody of the revenue of the State, were motives with the Legislature to guard effectually its funds against the frauds, negligence or omissions of its officers. But to enforce the law, there is no occasion to look out for motives for its enactment. *Ita lex scripta est*, is all sufficient—and the law is written that, in suits by the Central Bank of Georgia, no proof of demand, notice, or protest shall be required.

This bill of exchange which is the subject of the present suit, was discounted under the 4th section of the act of 1838, (*Pamphlet*, 46,) which only confers authority on the directors to discount, without respect to the limitation in the 25th section of the charter. This enlargement of the authority of the directors, does not repeal the provision in the act, of which this last is amendatory, which dispenses with proof of notice, demand and protest. There is no repugnancy, and without it there can be no repeal by implication.—9 *Cowen*, 507; 5 *Hill*, 225, 226. But arguments *ab inconvenienti* are resorted to, for the purpose of escaping from the operation of this section, in this particular case. 1st. That this paper does not bear date at the Central Bank, and is not payable there, and it would be a hardship on the endorser to hold him liable when he could not have known it was intended for discount at that bank. 2d. That to give effect to the statute, a bill of exchange, or other paper, held by other banks, might be transferred to the Central Bank, after the endorser had been discharged by the *laches* of the holder, in not giving the notice. Arguments *ab inconvenienti* are never admissible in resisting the operation of a statute. They are always good in opposing its enactment or advocating its repeal. But although the judiciary may not accord with the Legislature in the expediency of a law, it is nevertheless bound to enforce it, pro

vided it be constitutional. "If parliament will positively enact a thing to be done which is unreasonable, I know of no power," says Blackstone, "in the ordinary forms of the constitution, that is vested with authority to control it."—1 *Com.* 91. But instances occur, in which particular cases are embraced by the letter of a statute, which happen to be unreasonable; and the judiciary will then presume that such case was not foreseen by the Legislature, and will exclude it from its operation.—1 *Com.* 91. This is giving what is termed an equitable construction to a statute. But before this can be done, the case must be considered as not embraced within the intent of the Legislature; for, to construe a statute equitably, is to give effect to the supposed intention, instead of the words, of the Legislature; but this is never done except where an adherence to the letter would be palpably unreasonable; for it is to be presumed always, that the Legislature have selected such words as are proper to express their meaning. Banks may purchase paper not payable at bank.—*Prince*, 462. Then to the first branch of the argument in this case: The Central Bank had authority to discount bills of exchange or other paper.—*Prince*, 73, sec. xi. of the charter. *Pamphlet*, 1838, p. 46, sec. xx, applies in the first part to notes payable at the bank. Sec. xxvi. applies to notes, bills, bonds, and obligations. Bills, of course, are never payable at the bank at which they are discounted. In the forms given in the books, the bank or the house of the banker at which they are discounted is never put down. Nothing more than the city or town at which they are drawn. The bill of exchange declared on, corresponds with these forms. The town or residence of the drawers, and also the town at which they are payable, are given. In this respect, also, the bill sued on corresponds with the form. Then the bill sued on is in the usual form, and of course the bank, having authority to discount or purchase bills of exchange, had a right to discount or purchase such as were offered, drawn in the usual form. When a person, then, draws or endorses a bill of exchange in the usual form, he does it with the law, a public law, before him, declaring that there are institutions in the State at which it may be discounted, and from which he would not be entitled to notice. When it is offered at one of these institutions, it is presumed that it was drawn for discount there. This is a presumption of law, on the universally recognized principle, that every man is to be presumed to have acted fairly and in good faith. The party draws or endorses with the knowledge, then, that he may be held liable without notice. It is possible he might protect himself by a memorandum on the face, or otherwise, that it was drawn for discount at a bank from which he would be entitled to notice. This he could easily do. But if he puts his name on a paper, without such a restriction, it is an offer to the world and to any institution to be held liable according to the law or usage which governs it. Notice of the usage of a bank, inconsistent with the law-merchant, will bind an endorser.—*Renner vs. the Bank of Columbia*, 9 *Wheaton*, 584. If the knowledge of such a usage will bind the party, much more will a public law, which all are bound to know. But, so far as this paper is concerned, the plaintiff in error knew it was for discount in the Central Bank; for it was in renewal of one which had been discounted by that bank, and protested; and this was notice enough to bind it by the law of that bank.—9 *Wheaton*, 584. But, suppose it was

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drawn in the usual form, with the express understanding between the parties themselves that it was not to be discounted at the Central Bank, this private arrangement could not affect the bank or the public.

An equitable construction of the charter cannot aid the endorser, for by an equitable construction, the intention of the law-maker is to be enforced, even against the letter. But the letter and the intent go together in the charter; for the intent is, that the bank shall lose nothing, and none of its remedies, in any class of paper it is authorized to purchase or discount, by want of notice, demand or protest; and the expression is broad enough to embrace this case. The act has declared, that no proof of notice, demand or protest shall be required on any trial, and the act expresses the object and intent of the Legislature.

Again: this paper was discounted for the benefit of the plaintiff in error, and the proceeds were paid to it, and the plaintiff in error was the endorser, and it is not entitled to notice.—*French vs. the Bank of Columbia*, 4 *Cranch*, 161; *Agan vs. M'Manus*, 11 *John. Rep.* 181.

It may be laid down as a rule, that where the drawer has no funds in the hands of the drawee, and he or the endorser have reason to believe that the bill will not be honored, notice is unnecessary. In this case, acceptance was waived, of course, at the instance of the drawer or endorser, and which furnishes evidence that there were no effects in the hands of the drawee. Previous bills drawn and endorsed as this, and in renewal of which this was given, had been returned unpaid, which affords still stronger evidence that there were no effects in the hands of the drawee, and under these circumstances notice was unnecessary.—4 *Cranch*, 154.

If, at the time the bill was drawn, the drawer had no reason to expect that his bill would be paid, notice was unnecessary.—4 *Cranch*, 157; *Hopkirk vs. Page*, 2 *Brock. C. C. Rep.* 28.

A party drawing without funds, property, or authority, puts the transaction out of the pale of commercial usage and law, and he is not, in such case, entitled to notice.—*Dickens vs. Beal*, 10 *Peters*, 578.

It is contended, that the effect of enforcing this act will be, to place it in the power of the Central Bank to purchase up dishonored paper from other institutions, whose duty it is to give notice to endorsers and drawers to charge them, and, in this manner, to hold them liable after they had been discharged. This argument is drawn from the presumption, in the first place, that the officers would commit a breach of duty; which is inadmissible, and contrary to the rule, that an officer is to be presumed to execute his office until the contrary appears.

It is true, that such a case is not embraced within the intent and meaning of the act, and the defendant could not be held liable. But, because a party in such a case would not be liable, it affords no reason for setting aside the act. He would be presumptively liable. The suit being brought by the Central Bank, on the maxim that "*omnia presumuntur rite acta*," it would be presumed that the note or bill was negotiated at the Central Bank before due, and that it was taken at the bank, in the usual course of business at that bank. If it was not, it would be a matter of defence.

The same presumptions would exist in favor of the Central Bank, in such case, that would in favor of an individual who had purchased a note over due, not payable at bank but negotiated to a bank, but

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on which the bank had lost its remedies against the endorsers, by a failure to give the notice. The plaintiff would not be required to prove that the note had not been negotiated at bank, as an excuse for not giving the notice.

He would be presumed to be the holder in a fair course of trade. But this presumption could be rebutted by the defendant, by proof of his discharge for the want of notice, the note having been negotiated to, or deposited in, a bank.

In this case, there is no averment of notice of protest, or non-payment, and such proof was not required by the pleading. The party did not demur to the declaration, or move in arrest of judgment, and there is no exception on that account.

The sixth, and last ground of error complained of, is, that the court refused to rule that the original protest must be produced or accounted for. The court reiterated its former decision, that no notice or protest was necessary; and the authorities and arguments adduced, on the last point, are referred to, as sustaining the court on this, with this addition: that, in a suit in favor of the Central Bank, a notice or protest is no more necessary, in case of a foreign bill of exchange, than is required on an inland bill. In Georgia, a bill drawn in one State on another is an inland bill, and a protest is only necessary where the five per cent. damages are claimed.—*Prince* 454. As to foreign bills, see *Prince* 462.

The charter of the bank declares, that no notice of protest shall be required. This provision must have been made in reference to bills between different States, or foreign bills, for in no other case is a protest or notice of it necessary. The bill is admissible under the common counts.—*Chitty on Bills*, 594.

R. V. HARDEMAN, in conclusion, for the plaintiff in error.

By the Court—NISBET, Judge.

There are two counts in the plaintiff's writ: one founded on the bill of exchange, the other for money had and received. The testimony proves that the bill was discounted by the Central Bank, at the instance of Scott Cray, for the Bank of Hawkinsville; that the money was paid to him, and deposited in the agency of the Hawkinsville Bank at Macon, to the credit of Jerry Cowles, the drawer; and that two-thirds of it was applied in extinguishment of a debt due by him to the Hawkinsville Bank; the balance, Mr. Cowles was permitted to check out. Under this state of facts, if it is conceded that the Merchants' Bank of Macon is not liable to pay this bill, upon the endorsement of Scott Cray, yet it is, in our opinion, liable upon the common count, upon principles *ex æquo et bono*.

If a person, assuming to act as the agent of a corporation, but without legal authority, makes a contract, and the corporation receive the benefit of it, and use the property acquired under it, such acts will ratify the contract, and render the corporation liable thereon.—*Angell and Ames*, 2d edit. 178; 8 *Cowen*, 25; *Story on Agency*, sect. 162; 1 *Pick'y*, 372; 7 *Cranch*, 299; 19 *Johns. R.* 60; 4 *Wend.* 624; 5 *cat.* 334. It is contended by the plaintiff in error, that as, and of

an agent, to be binding upon his principal, must be done in the name of the principal; and, inasmuch as the name of the principal does nowhere appear on this bill, it cannot be evidence to charge the principal, the Merchants' Bank of Macon, formerly the Bank of Hawkinsville. The bill is payable to the order of Scott Cray, agent; drawn by J. Cowles, upon the cashier of the Fulton Bank, New York; acceptance waived, and endorsed "Scott Cray, agent."

The inference drawn from the paper is, that Scott Cray acted as agent for some person, or corporation, but who, or what, does not appear. The name of his principal does not appear. The general rule is this: in order to bind a principal, on a contract made by an agent, it must purport, on its face, to be the contract of the principal; and his name must be inserted in it, and signed to it. It is not enough, that the agent be described as such in the instrument.—*Story on Agency*, sect. 147; *Paley on Agency by Lloyd*, 180, 181, 182; 2 *Kent*, 629, 3d edition.

This rule applies, more particularly, to solemn instruments under seal; and as to them, to use the language of Judge Story, it is "regularly true," but not universally true in all its extent. For, so far as regards instruments under seal, there are some exceptions to some of the requirements of the rule. Although the rule is thus strict as to sealed instruments, yet a more liberal rule obtains as to unsolemn instruments, especially commercial and maritime contracts. In such cases, in furtherance of the public policy of encouraging trade, if it can, upon the whole instrument, be collected, that the true object and intent of it are, to bind the principal, and not merely the agent, courts of justice will adopt that construction of it, however informally it may be expressed.—*Story on Agency*, sect. 154. This is a commercial contract, not under seal, and comes under the rule last laid down. If an agent, in a parol contract, intends to bind his principal, and appears to act as agent, the principal is bound.—*Wheaton's Selwyn*, 823, note 5, Am. ed.; 2 *Fairfield*, 267; 8 *Pick.* 56; *Angell and Ames*, 235-6-7.

It may be stated generally, that where it appears from the face of the paper, that the credit is not given to the agent, and the name of principal is disclosed at the time of the transaction, and the act is within the powers of the agent, the principal is bound. The question whether the agent is bound, does not affect this question, for there are many cases where both principal and agent are bound. Now, it is apparent on this bill of exchange, that it was the intent of the parties to bind Scott Cray's principal: else why make it payable to him as agent, and why take his endorsement as agent? It is still more manifest that he does appear to act as agent. The testimony upon the trial, too, is, that the name of his principal was disclosed to the Central Bank at the time the bill was discounted. We hold, too, that upon parol contracts, where the intent is not sufficiently clear that the principal is to be bound, the defect can be supplied by parol testimony. A party cannot be discharged, who is apparently liable on the contract, but a new party may be introduced by parol.—*Ang. and Ames*, 236-7; 5 *Wheat.* 22; 1 *Cowen*, 536; 12 *Mass. R.* 240; 1 *Cranch*, 345; 6 *Adolphus and F.* 486; 8 *Meeson and Welsby*, (*Excheq.*) 440. See, also, *NI Agency*, 190, 191, 334-5-6.

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The testimony on the trial shows that it was the intent of the parties to bind the Bank of Hawkinsville by this endorsement.

The second assignment of error is, that this bill of exchange is not evidence against the defendant, because it is not signed by the president and countersigned by the cashier, as is required by the 8th section of the charter of the Bank of Hawkinsville. That section declares, that the funds of the company shall, in no case, be liable for any contract or engagement whatever, unless the same shall be signed by the president and countersigned by the cashier of the corporation. —*Prin.* 108. This provision is found in most of the bank charters of this State, and if construed to apply to bills of exchange, checks, and drafts, as well as to all the contracts or engagements of the banks implied in law, then there will be introduced an entire change in the manner of doing bank business in Georgia. Indeed, then it would be hardly possible to bank at all. There is nothing in the form of a contract, expressed or implied, that is not comprehended in the sweeping phraseology of this section. Neither the banks themselves, nor the courts, nor the mercantile community, have held it to apply to the ordinary business contracts of the corporation. Upon the interpretation contended for by the plaintiff in error, no bank would be liable for its deposits; nor upon any of that large class of engagements which, in mercantile affairs, result by implication or operation of law. This is not all; credit, which is based upon character, upon good faith, upon honor, and which constitutes the soul of commerce, would be no longer an element in banking.

For this would be substituted, in all cases, when practicable, the president's signature and the cashier's certificate. Who would deal with a bank which, in bar of its cashier's checks, drafts, or endorsements, could successfully plead the absence of its president's signature? What company, with honest purposes, would accept a charter, if the franchises conferred were to be enjoyed solely upon the condition that no engagement, of any kind, could be entered into but in writing thus formally authenticated. If it be a privilege to a bank, to be bound only by contracts in writing, signed by its president and countersigned by its cashier, then common honesty, as well as her interests, would compel her to make no other. The privilege contended for by the plaintiff in error, would work an estoppel to banking in Georgia. Thus we arrive at the conclusion, that the Legislature did not intend, in these comprehensive words, to defeat the very objects contemplated in this charter. The whole act must be construed together; all parts of the charter must stand, if possible, and the different parts must be made to harmonize. We cannot suppose that the Legislature intended to confer banking privileges, and in the very act which confers them, insert a clause which, in the form of guardianship or protection, practically annuls the charter.

In the judgment of this court, the clause of the charter does not apply to such contracts or engagements as occur in, or are necessary to, the ordinary business of a cashier or agent (*Ang. and Ames*, 231-2; 5 *Wheaton*, 326); such as drawing or endorsing bills of exchange, checks, and drafts. These acts appertain, according to commercial law and usage, to the office of a cashier. The record discloses

Mr. Cray was the general agent of the Bank of Hawkinsville, at Macon. He possessed, as such, more than the power which ordinarily belongs to a cashier. He had charge of the agency of the bank at Macon; *virtute officii*; therefore, he was clothed with all the powers of a branch of the Bank of Hawkinsville. Among those powers, certainly, is the power to discount bills of exchange (*Angell and Ames*, 243-4-5); to deal in bills, was no doubt the prime object of creating an agency at Macon. He was held out to the public as the general agent of the Bank of Hawkinsville, at Macon; and being so held out, the bank was bound by all his acts, done within the scope of that agency, even although restricted, as to certain acts, by secret instructions. There is no doctrine better settled than this. It is the doctrine of the Roman, as well as the commercial law.—See 12 *Wheaton*, 70; 1 *Harris and Gill*, 392; 3 *Mason*, 505; 21 *Wend.* 296; *Ang. and Ames*, 222, 234, 238; *Story on Agency*, sec. 126-7-8. Also, we hold that, in the absence of any express power to draw and discount and endorse bills of exchange, that the Bank of Hawkinsville was liable upon this endorsement, according to the principles just stated; but if this were not so, it is liable, because the order of the board of directors expressly clothes Mr. Cray with power to draw and discount bills of exchange. The power to discount confers the power to endorse. Wherever an agent is empowered to do a particular thing, he is also empowered to use the means necessary to accomplish it. The means are included in the power.—*Story on Agency*, sec. 77. A power to discount bills includes a power to endorse.—*Story on Agency*, sec. 59; *Bayley on Bills*, 5th ed. chap. 2, 7. In the *Mechanics' Bank of Alexandria vs. the Bank of Columbia*, reported in 5 *Wheaton*, 326, there is a construction put upon the 8th section of the charter of the Bank of Hawkinsville, by the Supreme Court of the United States—we say a construction put upon this section, because that case arose under the provision of a bank charter almost identical with it. The provisions of the two charters are in all material particulars the same. The words of the charter of the Mechanics' Bank of Alexandria are: "All bills, bonds, notes, and every other contract or engagement on behalf of the corporation, shall be signed by the president and countersigned by the cashier, and the funds of the corporation shall in no case be liable for any contract or engagement, unless the same shall be so signed and countersigned as aforesaid." By comparing this section with the provisions of the charter of the Hawkinsville Bank, hereinbefore recited, their substantial identity will be seen. The Supreme Court, in this case, determined that the clause of the charter of the Mechanics' Bank of Alexandria did not apply to a check drawn by its cashier, or to contracts implied in law.

The third ground of error is, that Scott Cray exceeded all the powers conferred upon him specially, and also all the powers of a general agent, in endorsing this bill, because it does not appear from the evidence, that the bill had ever been the property of the plaintiff in error.

The bill being made payable to the agent of the plaintiff in error, and in the hands of his immediate endorsee, the only fair inference is, that it was discounted at the instance of the plaintiff in error; and presented by the plaintiff in error for discount, it is equally clear he was the owner. Ownership may be inferred, too, from the

endorsement. The bill itself affords evidence enough of ownership, to cast upon the defendant, in the court below, the burden of disproving it. The testimony, however, as to the ownership, is not confined to the bill itself. It is in evidence, by parol, that Mr. Cray went to Milledgeville by direction of the president of the bank, for the purpose of procuring a discount from the Central Bank, and that while there, under an arrangement with Mr. Cowles, the drawer, this bill was put into his hands to be discounted at the Central Bank—that it was presented by him, discounted, and the money paid to Mr. Cray. The ownership of the bill was a fact for the jury to determine upon the evidence submitted to them; they have passed upon it, and it is not the business of this court to disturb their finding.

The fourth ground of error was abandoned by the counsel for the plaintiff in error.

The fifth ground of error is, that the plaintiff did not prove demand of the drawee and notice to the endorser, and therefore they were not entitled to recover.

Bearing in mind the circumstances under which this bill was discounted at the Central Bank, it will also be remembered that the action upon it was brought by the Central Bank against the Merchants' Bank of Macon; who had by endorsement negotiated it to the plaintiff. It is contended by counsel for the defendant in error that, by the charter of the Central Bank, demand and notice was not necessary; and in this opinion of the learned counsel, this court coincides. The 20th section of the charter of the Central Bank declares: "The directors of said bank shall not require town endorsers upon any note or obligation made payable at said bank, when the country endorsers are deemed amply responsible to secure the payment of the same, and no notice or protest shall be necessary to charge any endorser, nor shall any charge be made by any notary public, for noting for nonpayment, or protesting any note due at said bank."—*Prim. Dig.* 74. This section, by its terms, is claimed, and we think rightly, to apply only to notes and obligations made payable at the Central Bank. Section 26th of the charter provides, that in "all suits commenced by said corporation upon any note, bill, bond or obligation, upon which there shall be any endorser or endorsers, the maker or makers, together with the endorser or endorsers, or their representatives, may be embraced and sued in the same action, and no proof of notice, demand, or protest, shall be required on any trial, to authorize a recovery." These sections repeal the *law-merchant*, requiring demand and notice to charge endorsers, in all the cases contemplated by them. This is so, or language has no meaning. The Central Bank is founded on the public funds; it is the financial agent of the State; and with a view to the greater security of those funds, and to the greater facility of collecting the debts due it, and the consequent increased efficiency of the institution as a fiscal agent, these preliminary steps to charge endorsers were dispensed with. One of the objects of the organization of the Central Bank, was relief to the people by accommodation loans; in consideration of which, it was no doubt thought but reasonable to withhold the right to notice which the law gave to endorsers. Be these things as they may, it was clearly the policy of the State, in organizing a banking institution upon ~~the~~

funds, to prescribe the conditions upon which the public should deal with that institution. These conditions are embodied in the charter, and are made known to the world. Without feeling under obligation to give a good reason for all the laws of the State, we do feel it to be the paramount duty of this court to enforce them, if they are constitutional. Now, whosoever takes the privileges of this institution, takes them *cum onere*; and one of the burdens which he assumes is, to give an endorser or endorsers, who shall be liable without notice. Nor is it incumbent upon us to demonstrate the convenience of the law, when there is no doubt in our minds as to what the law is; it is sufficient for us to say, "*Ita lex scripta est.*" We do not deny that arguments "*ab inconvenienti*" are legitimate aids to construction, in cases where the meaning and intent of the law is doubtful, and where other approved rules of construction have failed sufficiently to elucidate it. In the present case, we cannot say that we have a reasonable doubt about the meaning of the two sections under review. The limitation in the 20th section, which confines its operation to notes or obligations made payable at the Central Bank, is not found in the 26th. That enacts, that in all suits, commenced by the corporation upon any note, bill, bond, or obligation, the maker may be joined in the action with the endorser or endorsers, or their representatives; and it farther declares, that no proof of demand, notice or protest shall be required in any trial to authorize a recovery. Now this was a *trial* of an action *on a bill*; upon which, the charter declares, no proof of notice, demand or protest shall be necessary to authorize a recovery. In the teeth of this very plain provision, the plaintiff in error contends that proof of demand and notice was *necessary* to authorize a recovery. The counsel for the plaintiff in error, in his able argument, insisted that the 26th section applied only to cases where the maker and endorsers are sued in the same action; that is, inasmuch as the section permits a joinder of these parties in the first division, therefore, the distinct enactment in the second division is limited in its application to trials where there is such joinder. We think this is a *non sequitur*, and that the latter division is as general as it would be if it stood alone in the charter.

There is in fact no necessary connection between the two divisions. The language used is, no proof of demand, notice or protest should be necessary in *any trial*, neither on a trial of a joint action or *any other*. All trials, and therefore this, are embraced in the general language of the act.

By the 25th section, the amount of loans to any one person, or body corporate, or society, or collection of persons, is restricted to \$2,500. In 1838, the Legislature authorized the bank, for the purpose of remitting money to pay the interest on the State debt, to purchase exchange beyond the amount of \$2,500, to which their loans were limited by the charter. This bill was discounted under the act of 1838. It is contended, then, farther by the counsel for the plaintiff in error, that this debt was not contracted under the charter; but being contracted under a law of the Legislature, the general law as to notice, and not the charter, governs the contract, and, if so, the notice was necessary. The law of 1838 is a repeal of the charter, so far as it limits the amount authorized to loaned to any one person, and permits the bank to purchase exchange

sums greater than \$2,500. To this extent it repeals the charter, and no farther. It does not repeal that provision of the charter which dispenses with proof of demand, and notice and protest. Nor is the act of 1838 in conflict with that provision; if it were, it would be repealed by implication. It is said that this bill is not made payable at the Central Bank, and therefore is not subject to the provision of the charter dispensing with demand and notice. The answer to this idea is, that the 26th section applies to all bills, bonds and notes and obligations, whether payable at the bank or not. Again: it is contended that, inasmuch as this bill is not payable at the Central Bank, the endorser could have no means of knowing that it would be discounted there; but must needs infer that it would be subject to the general law of the land, and therefore it ought not to be brought within the provisions of the charter, as to demand and notice. This reasoning amounts to this, that the charter itself is a fraud upon an endorser so situated. But how can this be so? This bill is payable at ninety days, and is drawn upon a bank in New York: the endorsement was a voluntary act. It was liable to be negotiated at any bank in the State, and as well at the Central Bank as anywhere else—the charter of that bank, as well as the act of 1829, authorizing it to deal in exchange. All the provisions of that charter are presumed to be known to the endorser. The Bank of Hawkinsville was presumed to know that the Central Bank could discount this bill; and, if it did, it was exempted from the usual necessity of demand and notice; for the charter, being a public law, is notice to the world of all its provisions. The endorsement was made therefore at the risk of the paper falling into the hands of the Central Bank: it was made subject to that form of liability which the law creates in that event. It is quite immaterial what may have been the expectations or understanding between the drawer and endorser, as to the destination of this bill, unless the Central Bank was a party to them, for in that event only would it be bound by them. But the facts of the case preclude the application to it of the reasoning which we have endeavored to silence. This bill was presented by the endorser at the board of the Central Bank for discount; it was discounted for the benefit of the Bank of Hawkinsville; the money raised upon it was in fact paid to the endorser. It (the Bank of Hawkinsville) became voluntarily a dealer with the Central Bank, with notice of the fact that demand and notice was not by her charter necessary to charge the endorser. It endorsed the bill to the Central Bank. It therefore made with the Central Bank a contract, into which that provision of the charter which dispenses with notice entered. The Bank of Hawkinsville is estopped. It cannot in the face of its own contract to the contrary, claim the benefit of want of notice.

A party dealing with a bank, with knowledge of its usage in contravention of the general commercial law, will be bound by the usage.—*Wheat*. 584. With stronger reason will a party be bound by the charter of a bank, whose provisions are in conflict with the usual rules of commercial law. An argument, *ab inconvenienti*, against the construction of the charter for which we contend, is drawn from the power which such construction would give to the Central Bank to charge an endorser. In cases where he is discharged by want of notice. Thus, the holder of an endorsed paper fails to give notice, and the endorser is discharged; th

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paper is then transferred to the Central Bank, which, under its charter, notwithstanding, collects the money out of the endorser. Such a case would not come within the 26th section; not because it would not be embraced in its terms, but because the rights of the endorser being fixed by the law regulating his contract, the subsequent ownership of the paper by the Central Bank could not divest those rights. The Central Bank would buy the paper, subject to the law, which, up to the time of her becoming the holder, governed it. She would become the transferee of a paper upon which the endorser is discharged, and would acquire no more rights against him than if his name had never been on it. Would she, then, in such a case, be required to show notice or be nonsuit? Certainly not. She is relieved by the charter from the obligation to prove notice, upon all trials. But, she being the holder of a paper transferred after due, the defendant is let into his defence. That defence is, that before the bank became the owner of the note or bill sued on, he was discharged for want of notice. We have no doubt but that the defence would be triumphant; and thus the general law, regulating the rights of endorsers and the special provisions of the charter, would harmonize. Whether this be considered an inland or foreign bill, we do not find it necessary to decide, as we believe the bank charter dispenses with notice in either case.

Nor do we deem it necessary to express any opinion as to what would be the rule, according to the law-merchant, upon the sixth and last ground of error, to wit: that the protest itself, being the highest and best evidence, the court erred in admitting the evidence of the notary.

The charter is very explicit; no proof of demand, notice, or protest, is necessary in any trial to a recovery.

Let the judgment of the court below be affirmed.

No. 65.—ROBERT COLLINS, plaintiff in error, vs. The CENTRAL BANK OF GEORGIA et al., defendants in error.

The 11th section of the charter of the Monroe Railroad and Banking Company, gives to bill-holders a paramount lien, for the payment of their bills, upon that part of the road only which was built by the company.

Such portion of the road as was built by the contractors, under a mortgage thereon, to secure them for the work done, and materials and equipments furnished, is liable to them, and their lien is paramount to that of bills or notes; the lien of the latter only attaching upon such portion of the road as was built by the company.

The setting apart of bank bills, as a pledge or security, by the said banking company, was not an issuing of such bills as a circulating currency, within the meaning and intention of the charter.

A bill was filed on the chancery side of the Superior Court of the county of Bibb, at the instance of the Monroe Railroad and Banking Company against the Roswell Manufacturing Company and others, the creditors of the former, the object of which was to obtain a decree for the sale of the railroad and equipments, and all the rights, franchises and property therewith connected, and for a distribution of the proceeds among the creditors, in order of priority of their claims, the said railroad company having become hopelessly in

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solvent, and unable to complete the road, or keep the same in operation, or pay their debts. At May Term, 1845, of said Superior Court, a final decree was rendered in said cause, ordering the sale, and appointing certain commissioners to carry the same into effect, and providing that the proceeds of said sale should be paid to the clerk of said court, and by him deposited in bank, for safe keeping, on special deposit, and that public notice should be given to the creditors of said company to file their respective claims, or a schedule thereof, in the clerk's office of said court. That the creditors, if any controversy should arise respecting said claims, should then litigate amongst themselves, in respect to all objections which would or might have been available against them by the company, if said sale had not been made, in relation to matters of set-off, and whether they should be subject to objection on account of the statute of limitations, non-performance of contracts, or other causes, embracing the quantum of consideration paid for claims, or any of them; and also, that the liens claimed by the respective creditors should be then and there also investigated and adjudicated.

The sale took place, and the sum of \$160,525 33 brought into court. At May Term, 1846, of said Superior Court, the question of the distribution of said fund amongst the claimants who were creditors of said company came on to be heard, before Judge Floyd, when it was moved, on the part of the defendant in error, and other bill-holders of said company, that the court should order and decree that said fund should first be applied and paid out in satisfaction of said bills, as having priority over all other claims, by virtue of a statutory lien created under the 11th section of the charter of said company, as follows: "*The railroad to be built by said company, from Macon to Forsyth, together with all revenue arising therefrom, and all the property, equipments and effects therewith connected, shall be pledged and bound for the redemption of the notes, or bills, issued by or from said company;*" which motion was opposed by the counsel of the plaintiff in error, as mortgagee, who contended, and maintained, before the court below, that the statute relied on by the counsel for the bill-holders did not create a legal specific lien paramount to all other liens on said road. And they contended for, and moved the court to rule that, as the plaintiff in error was, *bona fide*, the holder of bonds, certificates, or notes, secured by mortgage on said road and its appurtenances, to secure the payment for work, labor and materials, done and furnished on said road, subsequent to the execution of said mortgage, and on the faith of said mortgage, the plaintiff in error was entitled to be paid out of said fund, in preference to bill-holders. In behalf of the plaintiff in error, it was then shown to the court, that in 1842 the said company became entirely unable to proceed with their work, and which was then in a very unfinished and ruinous condition, even below the city of Griffin. In this situation, on the second day of August, 1842, the company entered into a contract with the plaintiff in error, and others, his associates, for certain work, and materials, as agreed upon in said contract, the company agreeing to secure the payment for said work and materials, by a lien, or mortgage, on the road and property of the company. Under this contract, a large amount of work was done, and materials furnished, on said road. Amongst other things, about 1,200 tons of railroad iron, with cars, car-wheels, engines,

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tenders, tools, &c., to the amount, by engineer's estimate, of \$154,146 86; besides which, said contractors furnished timber, and built about thirty-six miles of superstructure, and several miles of grading, leaving only four miles to be done to complete their contract, which would have been done but for hindrance by the company.

The mortgage clause of the agreement of the second of August, 1842, was in the following words, viz.: "It is further agreed by the parties hereto," (the Monroe Railroad and Banking Company, on the one part, and John D. Gray & Co., D. McDougald, A. B. Davis, Robert Collins, and Elam Alexander, of the second part,) "that the whole of the Monroe Railroad, to the point of junction with the Western and Atlantic Railroad, and all and every part thereof, implements of every kind therewith connected, or to be connected, and all real estate to the same appertaining, and all other effects to the same appertaining, shall be and is hereby conveyed and vested in the said parties of the second part, (the plaintiff in error, and associates,) in full title and estate, until all the dues and payments to which they shall become entitled under this contract shall have been fully met and satisfied. *Provided*, however, that the management, superintendence, and keeping up of said road, and the use of the property, &c., herein named and conveyed, and of all transportation thereon, shall continue to be conducted by the said Monroe Railroad and Banking Company, their officers and agents."

It appeared that the plaintiff in error, and his associates, performed their part of the contract, except the completion of four miles of the road, which they were prevented from doing by the company.

After argument in the court below, the presiding judge ruled, and decided, that the lien created by the bills of said company, under the said 11th section of the charter, was paramount to, and overrode all liens, and that said motion of the bill-holders should be granted; and overruled the motion of the plaintiff in error, and adjudged and determined that the said fund should be paid out, in the following order:

Costs legally incurred in obtaining the decree, and making the sale under it.

Attorneys' fees, for bringing the money into court.

The taxes of the company due the State of Georgia.

Then bank bills, each bill to take in proportion to the value received by the bank for it, at its emission by the bank. Judgments founded on bank bills, to take *pari passu* with bank bills, and under the same terms.

Next in order, judgments founded on contracts, other than bank bills and mortgages, according to the respective dates of each; judgments for right of way included as judgments. All other claims, not reduced to judgments, nor secured by special lien, placed on the same footing; and appointed certain auditors to hear and audit the claims submitted, and to make report thereof, &c.

Whereupon the counsel for the plaintiff in error, as mortgagee under the contract aforesaid, excepted upon the following grounds:

1st. Because the court below ruled and decided that the clause in the charter of said Monroe Railroad and Banking Company, declaring that said road should be "pledged and bound for the redemption of the bills or notes of said company," created a specific and paramount legal lien, on said road, over all other liens.

2d. Because the court below decided, that the directors of said com

pany could not make a mortgage or transfer of said property, (road and fixtures,) so as to exclude the statutory lien of bill-holders.

3d. Because the court below decided, that the bills of said company had a specific lien on the whole money arising from the sale of said road, when the statute creating said pretended lien in favor of bill-holders, only extended to a part of said road, to wit: that part of said road extending from Macon to Forsyth.

4th. Because the court below decided, that the work and labor done on said road, and materials and iron furnished and put on said road by the contractors to whom said mortgage was given—which said work was done, and materials furnished after the insolvency of said railroad and banking company—was liable and subject to the payment of the bills of the company, in preference to said mortgage or debt for said work and materials.

5th. Because the court below decided, that the bank-bills should each take in proportion to the value received by the bank for it, at its emission by the bank, whereas the original decree fixed the *quantum* of consideration, paid for the bills by the claimants, as the amount to be received.

Afterwards, in an adjourned term of the court below, the plaintiff in error showed, that at the same time the mortgage contract aforesaid was made by said company with himself and his co-contractors, it was also agreed that the sum of \$300,000, of the bills of said banking company, should be set apart and placed in the hands of a third party, to be held as further security to said contractors, and to be delivered to them in the event that it should be decided by the judicial power of the State, that the bills of said bank had any preference or priority over other claims, by virtue of the said 11th section of the charter of said company: and in accordance with said agreement, said bank-bills, to the extent of about \$200,000 were set apart and held for that purpose.

So the matter stood until the term aforesaid of the court below, when the presiding judge ruled as aforesaid, that bills of said bank had preference and priority over the mortgage claim against said company. Whereupon the said plaintiff in error caused the very same bank-bills which had been so set apart as aforesaid for that purpose, to be brought forward and delivered to the auditors, and required that the amount of his said claim should be audited from the bills, according to said contract with the company; but the auditors declined to do so, and the court below decided, that said bills could not be considered as bills issued by the said company, and therefore they could not be admitted to receive, from the fund, any *pro rata* or other share with other bank-bills. That, as to said claim of the plaintiff in error, to be allowed to claim, and take out of said fund as a bill-holder, by virtue of the bills set apart by said bank, as a collateral security, to secure said plaintiff in error, and others for work done and materials furnished on said road, the same was invalid, by reason that said bills, in the opinion of the court below, had never been legally issued by said bank. To which decision and judgment of the court below, the plaintiff in error excepted.

Because the court below erred in deciding, that the said bills, set apart as collateral security, to secure the plaintiff in error and his co-contractors for the work and labor done, and materials found and furnished, on said road, had not been legally issued by said bank, and therefore could claim any of said fund.

S. T. BAILEY, for the plaintiff in error.

The subject of controversy that gave rise to this writ of error, is the distribution of a fund arising from the sale of the Monroe Railroad and its effects, by virtue of a decree in equity, at the suit of the Monroe Railroad and Banking Company, against the Roswell Manufacturing Company and others; which latter company, seeking to subject said road to levy and sale at law, by virtue of *feri facias*, was enjoined by said suit upon grounds set forth in the bill, and which bill finally took such shape as to pray for and obtain a decree for said sale.

After the money was brought into court, the claimants for said fund, as creditors of the Monroe Railroad and Banking Company, brought before the court their claims; among such claimants was the present plaintiff in error, claiming to have created nearly the whole of said road, by his labor and materials, found and furnished, and the sale of which produced the greater part of the fund in controversy; and having been turned away empty, he has appealed to this tribunal, feeling assured that he can maintain successfully, in all Christian lands, "that the laborer is worthy of his hire."

To come to a correct conclusion upon the questions raised by the bill of exceptions, it will be necessary, in the outset, to understand clearly the powers and character of the Monroe Railroad and Banking Company, the title by which they held property, and the character of the fund produced by the sale of their road.

By the act of 1833, a company, by the name of "The Monroe Railroad," were chartered to construct a road from Macon to Forsyth; were empowered to purchase, accept, hold and sell, and convey real and personal estate, and make all contracts usual with corporations, &c. All the officers authorized by this act, are a president and eight directors. They were empowered to "purchase the right of way" for their road; they were authorized to farm out or rent to any individual the use or franchise of their road. The shares of their stock are made assignable. These provisions are important to be kept in view.

In 1836 an act was passed, called an act to amend, enlarge, extend and alter, and add to the act of 1833. But, instead of amending, the act creates an entirely new company, called "The Monroe Railroad and Banking Company," which, by said corporate name, shall be capable in law of contracting and being contracted with, of suing and being sued, &c. The old company is expressly amalgamated and incorporated into this new company, as a constituent part thereof—its rights and liabilities are expressly transferred to the new company: all this is, both in law and logic, a new creation, not the amendment of an old. What lawyer ever imagined it necessary to reconfer the right to sue and be sued, &c., on a corporation at each amendment of its charter, or that there must be a solemn assignment of the rights, liabilities and property of the corporate body in its old dress, to the same body in its amended dress? But all know that this is necessary where a new corporation supersedes the old. This new charter creates a stock of \$600,000, and directs one half to be appropriated to the road, and the other half to constitute the capital stock for banking purposes.

For this new company there are to be a president and six directors,

and for the "banking department" (so the act calls it) there are to be a cashier and other officers. And it is reiterated, that one half the capital paid in shall be faithfully set apart and applied to the building the road. The eleventh section of the act on which the court below predicated its decision, is in these words: "The railroad to be built by said company, from Macon to Forsyth, together with all the revenue arising therefrom, and all the property, equipments and effects therewith connected, shall be pledged and bound for the redemption of the notes or bills, issued by or from said company; and for the redemption of the same, the private property and individual persons of the stockholders shall likewise be pledged and bound in proportion to the number of shares held by each, in the same manner as in commercial cases or actions of debt."

The act further provides, that the company may increase their stock, so as to extend the road to the State road in De Kalb, and also that the State may subscribe for one-fourth part of the stock in the extension. The 22d section declares that "the several laws forming the charter of the Monroe Railroad and Banking Company shall be in force, and applicable to the road extended beyond Forsyth, in respect to banking privileges, and in all other respects, in the same manner as they are in force and applicable as to the road from Forsyth to Macon." It will be remarked that, in this new charter, nothing is said about the company's accepting, holding, buying and selling, real and personal property, as in the old charter, nor about renting and farming out the road. By the 23d section it is declared that the old charter shall be and continue in force in respect to the new charter, so far as it does not conflict therewith. It is by this latter section that the new company have the power to hold, buy and sell property and farm out their road.

We maintain that the company created by the act of 1836, called the Monroe Railroad and Banking Company, is a company composed of two distinct corporations, one for railroad purposes, the other for banking—not only are their duties kept distinct in the act, but the officers, as a body, are distinct; and the act expressly provides that the stock of each shall be kept distinct and separate. Such double corporations are well known and recognized in law.—*Angell and Ames on Corp* 52, 57; 1 *Pickering's Reports* 297, 305; 6 *ib.* 427; 1 *Sumner R.* 47; 14 *Mass.* 58.

In this view of the case, we clearly perceive the meaning and the reason of that somewhat singular expression in the 11th section of the new charter, that the railroad, with all its revenue, and all its property, shall be pledged and bound for the redemption of the notes or bills of the company.

Without that provision, the road would not have been liable for the debts of the bank, as a joint fund. The act itself had expressly made it a separate fund, so that without this exception in favor of notes and bills, the debts and liabilities of the road proper would have been entitled to preference, and would have to be paid before the debts of the bank could touch a dollar. This is the law governing the distribution of joint funds, and separate funds—it is the law of copartnerships; and we shall show that this company was essentially and purely a copartnership—a delusion to call it a corporation. Corporations are becoming

obsolete in this country—the name is retained without the substance—courts look beyond the name to the substance.

But now the holders of the bills of the bank attempt to so construe this provision of the charter, (intended only as a favor to place them on an equal footing with the debts of the road,) as to give them a prior right to take the whole fund instead of a part. But let us see into what absurdity it will lead to construe this expression, “shall be pledged and bound,” to create a lien in favor of bill-holders. Let it be kept in view that the act does not declare that notes or bills shall have priority, or take precedence over other debts, as is the case in statutes, giving the crown, in England, and the government here, a priority of payment.

The bill-holders, and the court below, were, therefore, driven to construe the words quoted from the charter, as giving a specific, prior and legal lien, overriding all other claims, contracts, or transfers, and of course, over mortgages.

Now, does not every lawyer at once perceive two insurmountable difficulties in this construction?

First, that it runs counter to the charter, which declares, the company may buy and sell real and personal estate. If this lien attaches, they could not make a clear title.

Secondly, such a construction is suicidal; for the road could neither be built, nor sustained after being built. Who would build a road from which he could not even hope to derive any profit—or who would “rent or farm out” such a road? For it is to be remarked that the “revenue,” as well as all the property, is “pledged and bound,” so that it must be carefully kept, like the capital stock of a bank, untouched; or if it is used, (either revenue or property,) it can be followed into whosoever hands it may pass, and they cannot plead that they took without notice, for all are bound to notice a public law; in short, the road and its revenue must be looked upon as bank capital; that is, in plain words, the construction and doctrine of the bill-holders, notwithstanding the charter has carefully declared, that even the stock of the two institutions shall be kept distinct.

But again: if a lien, it is a mortgage; and if a mortgage, then, when does it attach? at the date or the issue of the bill? In whose favor does it attach? in his who first took the bill, or in his last in possession? If the bank takes up the bill, does the lien cease until a reissue, and then does it again attach? and from what time, the date or the reissue? and if the latter, how are you to prove the time of the reissue?

Again: if a lien, it should have been a matter of record. Our statute requires mortgages to be recorded, and the general doctrine of lien, by all laws of civilized countries, is, that notice must be brought home to third persons, to affect them. It is no reply to say that the statute gave notice. Being a public law, the statute, *argumenti gratia*, says, that there may be a lien, provided there are any bills or notes of the bank to redeem; this is all the notice it gives. The material notice required is the note or bill when issued, its amount, date, &c.; for that the statute provides no record nor notice.

Again: if these bills are mortgages, they are void for not being recorded. And how are they to be foreclosed? If not mortgages, what are they? Are they such liens, that, like judgments, they can be le-

on the property pledged, without a verdict or judgment upon them? So they seem to be treated by the court below, when it adjudges that it will make no inquiry as to the genuineness or *bona fides* of the bills presented. But I trust this court will deem them only promissory notes.

In *Cashberd et al. vs. Atty. Gen.*, (6 *Price R.* 411; 2 *Eng. Ecl. R. Cond.* 523,) it was ruled that even a crown debt would not take precedence of an equitable mortgage, unless it was matter of record in some way. Mr. Powell says that liens and charges, even on equitable property, should be registered.—2 *Powell on Mort.* 622; 1 *Eden R.* 327. As, between the parties, a mortgage is binding without being recorded, and all others having notice, yet it is well settled that a mortgage intended to secure other debts not mentioned in the mortgage, cannot take precedence against other liens or purchasers, without notice of such debts, although the mortgage is duly recorded. If these bills are mortgages, where is the notice to the world, so as to guard against purchasing any of the property of the road, or any of its revenue? It is not enough to know that bills are in circulation—they may be spurious, or they may be taken up by the bank.

Again: we may admit, for sake of argument, the bills to have a mortgage lien upon the road between Macon and Forsyth, or that part built by the company before the new charter. What lien can they have upon that part of the road *above* Forsyth? This was not built at the time of the new charter—most of it never vested in the company: the legal title, by our mortgage, made and recorded before the road was built, vested in us so soon as made, to be divested when paid for. The franchise was all that the company ever had, and *that*, by the charter, they are expressly empowered to farm out. No one will contend that there could be any legal lien upon a franchise—that being but an emanation of sovereignty, it cannot become an article of trade, commerce, transfer or sale, only as the grant authorizes.

When it leaves the depository appointed by the sovereign power, it must return back to the sovereign who gave it. Like the soul of man, when it ceases to animate the body of its first earthly home, it cannot migrate to another, but must return whence it came. Suppose a case of daily occurrence: an insolvent individual, against whom there are judgments, desires a piece of land, for which he has made a verbal contract. He says to his neighbor, in writing, pay for that land, and use it until I repay the money, and then it shall be mine—would the judgment liens attach? Or, suppose the insolvent has the grant of right to make a bridge across a river: he employs a builder, and conveys to him the right to hold the bridge when built until paid for—could the judgments attach? Clearly not, for two reasons; first, because the bridge, as distinguished from the franchise, is in the builder—the materials never belonged to the grantee of the franchise, neither did the labor bestowed.

Secondly, if it were in the insolvent, it is so connected with the franchise that no legal lien could attach to it—it could only be reached in equity; and yet a judgment is as much a statutory lien as the bills of the bank in this case, even admitting, as contended on the other side, that they are liens at all. It has been adjudicated that a turnpike road is not subject to levy and sale.—*Angell and Ames*, 460, 461; 13 *Sergl. and Rawle*, 210; 17 *Mass. R.* 243. It has been held in all the courts,

as my knowledge extends, except in North Carolina, that a rail-

road is not subject to levy and sale. In the Supreme Court of North Carolina, it was held that they were subject to levy and sale—not the franchise, but the land over which the road ran. With the highest respect for that court, I must think they give no very good reason for their decision. It is true, as they say, the workmen who made the road ought to be paid; yet is that a reason that the rules of law should be violated? If the workmen neglected to secure themselves by mortgage, I humbly conceive their remedy was in equity.

Certain it is, that there is no title to the land over which the road runs, in the company, disconnected with the franchise. The moment it is sold from the corporation, it reverts to the grantor; the company had nothing but the "right of way." So that the plaintiff in execution, or rather the purchaser under the sheriff's sale, gains nothing by the sale, only the gratification, if it is one, of depriving the corporation of the right of way, and restoring the land to the original owner.

But the most insurmountable objection to such sale is, that, by universal consent of all courts, English and American, and even in North Carolina, these railroads are public highways; and if so, the North Carolina decision cannot be supported upon any principle of law or usage. If, then, this road was not subject to levy and sale at law, it was equitable property, to be reached only in equity. Such property is subject to mortgage, and no doubt the Legislature might have created a mortgage lien upon it, by declaring that the bills of the bank should be a prior lien upon the road and its revenues, to commence from their dates respectively, or from the time of registration, or from the commencement of a suit; but it is absurd to suppose that any Legislature could intend to give a lien, that should not only attach without any record or notice, but should act retroactively, so as to cover the whole property, and its revenue, *ab initio*, divesting all prior liens, and annulling all transfers and conveyances: such a construction, as we have before remarked, would be in effect to annul the charter.

Then, if this was equitable property, that could be reached by the creditors only in equity, and if, as we contend, the Legislature intended only to subject it to the payment of the "bills or notes" of the bank, equally with the debts of the road, in case of insolvency as a joint fund, then the next inquiry is, when does the lien of the bills commence, so as to prevent assignments of the property, and take precedence of younger liens? It is well settled that no general lien in favor of creditors attaches upon equitable property until the filing of a bill.—1 *Paige's R.* 637; 9 *Cowen's R.* 722; 3 *Atk. R.* 357; 5 *J. Ch. R.* 280; 1 *Paige's R.* 305. It is not within the statutes of Elizabeth against fraudulent transfers.—*Story's Eq.* 366, 367; 1 *Vesey, Jr.* 196; 9 *ib.* 188, 189; 10 *ib.* 368; 18 *ib.* 196.

Then, if this equitable property is not subject to levy and sale, the only course for the bill-holders to render it subject to their debts, was to obtain judgment on their bills at law, and then commence suit in equity.

The bill-holders lay by, and saw the plaintiff in error expend his labor and money in making the road; they sanctioned the proceeding; they cannot take advantage of their own *laches*; they never commenced suit.—1 *Paige R.* 638, 305; 4 *J. Ch. R.* 687

Such would have been their course against the road; their re-

varied, now that they apply for the fund arising from the sale of the road, and this we shall discuss hereafter. But here it is proper to remark, that the bills of this institution are to be treated like the bills of other banks; the act giving the charter does not change their character; they are promissory notes, entitled at law to no lien until reduced to judgment.—3 *Wend. R.* 21.

Before closing this branch of the subject, it is well to examine critically that section of the charter on which the bill-holders rely, as giving them a lien. The expression, "pledged and bound," cannot bear a legal definition: a pledge requires possession in the pawnee. Again: it is not a legal term when applied to real estate; the expression is used not in a strictly legal, but in a vulgar sense; it is the universal understanding in the common affairs of life, that to be "pledged or bound" only means that there is an obligation or liability; we often speak of a man's pledging his word; the understanding is, only, that he has given assurance that another may trust in his truth. We speak of one being bound as security for another; we understand, not that he is to pay that security debt in preference to all others, but that he is to pay on failure of his principal to pay. We speak of a man's property being bound to pay his debts; we never intend thereby, that his creditors have a lien on his property, but only that the legal title is in him, and not in his wife or others, and that his creditors can subject it to the payment of their debts, if they choose. In all these cases, a trust and confidence and obligation is understood. In this sense the Legislature intended to be understood; they intended to say, and we contend it is all they have said, on failure of the bank to redeem its bills, the bill-holders may resort to the road, however hard it may seem to the creditors of the road that they should have to divide their half with the creditors of the bank, after the latter have exhausted the whole of the half assigned to the bank; yet, for the safety of the community, they thought fit to impose this hardship on the creditors of the road. Who but bill-holders ever dreamed that this hardship was to be enlarged to a kind of robbery, by taking, not a part, but the whole—leaving nothing for the creditors of the road? Our construction is much strengthened by the fact, that the same expression, "pledged and bound," is applied to the persons and property of the individual stockholders. The Legislature intended to render liable the road, and the private property of the stockholders, neither of which would have been liable as a joint fund to pay the bills, without an express enactment to that effect.

But, finally, as the ultimate absurd result of the doctrine contended for by the opposite counsel, it is clear, not only that all the property (and that a considerable amount) which has ever been transferred by the corporation, is still subject and liable to their liens, but the road itself, with its revenues, is still liable to their lien; for the sale was not at their instance, nor were they parties to the proceedings; but the sale was by, and at the instance of, the Monroe Railroad and Banking Company.

If their lien is a mortgage, taking precedence of all other liens, then the law is clear, that neither the company, nor any judicial tribunal, nor any officer of theirs, can, without their consent, divest that lien by any process or sale known to the law. So that, if the decision of the below is to be sustained here, we are by no means the only sufferers.

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ers: purchasers who had just as much notice of this lien as we had, may be called upon to redeem these bills. It will not avail them to say, that they have built a new road; they will be told such a plea did not avail this plaintiff in error; neither will it avail them to say, that both the decree of the court and statute amending their charter, relieve them from the debts and liabilities of the old company; they will be told that no act of the Legislature can impair the obligation of contracts, and that no court can divest vested rights of parties not before them.

We, in the next place, maintain, upon authority, that this company was essentially and purely a copartnership. The court is familiar with the distinction between a copartnership and a corporation. All the authorities agree, that when the individual property of the members is by law made liable to the company debts, it is a mere copartnership.—*Angell & Ames*, 364, 493, 497; 17 *Mass. R.* 334; 1 *Mason R.* 243.

And Judge Story, and other judges, have decided that when they are declared to be liable, as in commercial cases, the members may be sued separately. This company thus being a copartnership, joint debts in equity have a priority of payment out of the joint funds and separate debts of the separate funds. Mr. Story, quoting the rule of the civil law as governing in such cases, says: When a person carries on two trades in different houses, the creditors who have given credit to one of those trades or houses, have a privilege upon the effects there found, to the exclusion of the creditors who have given credit to the other trade or house, and the latter have a like exclusive privilege upon the funds to which they have given credit.—*Story on Part.* 519, 520; *Gow*, 408, 409. Hence the additional necessity of the enactment in the charter of the Monroe Railroad and Banking Company, pledging the funds and effects of the road to the redemption of the bills of the banking department; thereby putting them on an equality in case of insolvency. Without such enactment, the creditors of the bank could not touch a dollar belonging to the road, till all who had given credit to the road were satisfied in full. This far, we have established that the property out of which this fund was raised was equitable property, that could not be reached by the bill-holders only in equity; and that the Monroe Railroad and Banking Company was a copartnership, and the fund was raised from the sale of joint or partnership property; and we have endeavored to show that the plaintiff in error would stand on an equality with the bill-holders, even if he were a creditor of the road on simple contract, by the provision of the charter upon which the bill-holders rely for the priority, as well as by the well-settled rules of equity, which distributes insolvent estates ratably *pari passu*.—1 *Story Eq.* 554; 1 *J. Ch.* 119; 5 *Peters' R.* 160; 11 *Eng. Ch. R. c.* 320, 322; 2 *Smith*, 275; 1 *J. Ch. R.* 130.

We propose now to show, that we stand on much higher ground than simple contract creditors, and that we have a prior right, first as mortgagees, and second, as having an equitable lien, for materials and labor conferred on the road. A mortgage gives the legal title, and is more than a lien.—*Cross on Liens*, 62, 72.

In bankruptcy, a lien by judgment is not saved.—*Eden*, 222, 285. A mortgage is protected.—*Eden*, 225, 290.

Although courts of equity distribute insolvent estates ratably *pari passu*, amongst all the creditors, yet it does not divest the property of mortgages.—1 *J. Ch. R.* 129. We, by our mortgage, under the laws of Georgia, had a common-law remedy; the bill-holders had no remedy, save in a court of equity; and when they come here for a fund, they must take ratably with all other creditors.—1 *J. Ch. R.* 130.

We will next show that we have not only a specific legal lien by mortgage, but that we have also a better equitable lien than the bill-holders; and, if we have both a legal and equitable title, we must prevail over a bare equitable title or lien.—2 *Powell on Mort.* 451, 452; 2 *J. Ch. R.* 608.

It is a well-settled principle in equity, says Mr. Justice Story, that in all cases where one has, *bona fide*, bestowed labor and materials on the property of another with his assent, by which an additional value is conferred on the property, it creates a prior lien upon the property until such improvements are paid for.—1 *Story Eq.* 478, 494; 2 *ib.* sec. 1234; *ib.* 799, note; 4 *Meeson & Welsby R.* 272; 5 *ib.* 342.

Again: when equity is called on to assist a creditor, it will insist that all creditors may stand on an equality.—1 *Story*, sec. 557; 1 *J. Ch. R.* 130.

Again: conceding, *argumenti gratia*, that the bill-holders would stand on an equality with us, provided there were no other fund to resort to, yet since they have two, and we have but one resort, equity requires that they should resort to that on which we have no lien; it is very clear that the bill-holders may resort to the road and to the individual stockholders for payment. No other creditors have that privilege; none but bills are secured by resort to stockholders; then equity says to the bill-holders: You shall let go the road, the only fund to which the plaintiff in error can resort, and take your pay out of the other fund, to which you can resort.—1 *Story Eq.* sec. 559; see *Atk.* 446; 17 *Ves.* 514, 520; 8 *ib.* 388, 395; 9 *ib.* 210, 211; 3 *ib.* 64; 4 *J. Ch.* 17; 1 *ib.* 412; 1 *Russ. and Mylne*, 185; 3 *Sim. R.* 280.

Before concluding, it is proper to remark upon this bill and decree, which brought this fund into court, that it will be perceived that the bill was originally filed expressly and avowedly, by the Monroe Railroad and Banking Company, to secure the plaintiff in error in the fulfillment and payment of his contract, for the satisfaction of which he applied to the court below for a share of this fund now in controversy.

That bill, for reasons not proper to state here, was so changed by the plaintiff in the cause, as to pray for a sale of the road, and that the fund might be distributed among all their creditors; it was originally filed to prevent a sale. It is obvious, therefore, that the complainants in the bill acted, as far as they were able, and as far as they knew how, in good faith toward the plaintiff in error. Their object (a just and righteous object) was to give the laborer his hire. Will any one do them the injustice—will any one so pervert the reading of the record, as to say, that the object of the complainants in that bill, was to sell the road, and give the money to the bill-holders, and exclude the plaintiff in error from even a participation in the fund? Although, by so doing, they would relieve the stockholders of a heavy liability, we believe they

acted in good faith, and that it does them gross injustice to suppose that they were using the judiciary as an instrument to perpetrate a most iniquitous fraud. Indeed, the decree speaks for itself.

It states that the road is subject to the payment of all the debts of the company, not the bill-holders alone, and it virtually orders that the fund arising from the sale shall be distributed amongst all the creditors, according to equity, after they should have established their respective claims.

It is proper that we should endeavor to relieve this court from a difficulty that found lodgment in the mind of the court below. It was this: The court remarked, in giving his final opinion, that he never had any doubt, that in justice and equity, the plaintiff in error ought to be paid in preference to all other creditors, and that it ought to have been so declared in the decree ordering a sale of the road, and that he should certainly have had the decree so drawn, but that it was now too late.

We were certainly not a little surprised at this difficulty in the mind of the court; but it was then too late to even attempt to remove it. We hope this court will perceive no such difficulty. It seems clear to us, that as that bill was filed, not by the plaintiff in error, but by the Monroe Railroad and Banking Company, the debtor praying for a judicial assignment of their property for the benefit of all their creditors, it would have been wholly against the practice and usage in equity, to decree the payment or priority of any particular creditor; that is always a matter to be settled on creditors coming in under a decree.

In relation to the bills set apart by the company as an indemnity, the question arose on the report of the auditors appointed to report to the court at its adjourned term, in July.

That report rejected the claim of the plaintiff in error to come in as a bill-holder, claiming to hold bills as an indemnity for the work and labor and materials, found on said road to be used, provided the court should adjudge that the bills were entitled to a priority over his mortgage on the road.

Several exceptions were filed to said report, or rather to the decision of the court below, on that report's coming in. But for the purpose of trying both cases together—the one on the decision at the term in May, and the other at the adjourned term in July—the plaintiff in error consented to waive all his exceptions in the latter case, except the one on the decision of the court respecting the collateral security on the bills.

That bank bills, although used as money, are promissory notes, in the contemplation of law, none can question. They are as legitimate subjects of pledge as any other chose in action, or any chattel; this cannot be denied.—3 *Wend. R.* 21; 9 *Paige R.* 12.

Then, did the Monroe Railroad and Banking Company pledge to the plaintiff in error and others, bills to secure or indemnify them for work, labor and materials furnished on the road? The evidence is, that there was a written contract under seal, between the parties, that some third person should take charge of three hundred thousand dollars of their bills, to hold as an indemnity, to be delivered to the parties, to be secured, in case the court should hold that bill-holders have a prior right over their mortgage. It is in proof that this package of three hundred thousand dollars was delivered to Dr. Wynne, as the depository selected

by the parties; that Dr. Wynne took a schedule of the bills, and left the package in the bank on deposit; that afterwards, the bank officers, without the privity or knowledge of the plaintiff in error, used some of the bills; that so soon as the plaintiff became aware of it, he prohibited it; that about \$200,000 remained, of the package in the bank, until deposited in court by the plaintiff, as a claimant upon this fund in controversy. This collateral security was rejected by the court, on the ground that the contract of indemnity, if sanctioned, would be a fraud on the bill-holders. A moment's reflection will correct such a fallacy.

It would be a fraud on the makers of the road not to pay them in some way, and the contract expressly provides that this collateral is to be used only in the event that the bill-holders override their mortgage security. And whence comes the fund that the bill-holders claim an exclusive right to, and out of which the court below, and the bill-holders, deem it fraudulent in the plaintiff in error to claim an equal share with them? It is a fund raised, the greater part of it, out of the sale of property created by our labor and materials, and to which neither the bill-holders, nor their debtor, the Monroe Railroad and Banking Company, had in equity any right, until we were paid. The objection amounts to this: that it is fraudulent in us to claim a participation with them in our own property.

We must think that it requires, in the bill-holders, much cool assurance, to come into a court of justice, a court of equity, and charge this honest arrangement to be a fraud upon them! In *Moses vs. Mergatroid*, 1 J. Ch. R. 129, the chancellor declares it the duty of a court of equity to render such collateral pledges effectual. Instead of being a fraud, it is very likely, that without the arrangement that was made, the bill-holders would get nearly nothing; for the road would not have been built, and its fragments would have been hardly worth selling. We repeat, that nearly all the fund in controversy is, as we believe, the production of the labor, skill, and money of the plaintiff in error and his associates, and for which he has never been paid; and to charge him with fraud, because he seeks to be paid, is but adding insult to injury, and gainsaying the maxim that is consecrated in all Christian lands, that "the laborer is worthy of his hire."

A. H. CHAPPELL, for the defendant in error, made and insisted on the following points:

1st. That the bank-notes or bank-bills issued by the Monroe Railroad and Banking Company, in accordance with law, and as a circulating medium, are by force of the words "*shall be pledged and bound*," &c., in the first clause of the 11th section of the charter, (*Prin.* 372,) secured by a statutory lien or mortgage on the railroad, its property and equipments. The words "*shall be bound*," is the ordinary phrase used, in our Legislature, to express the lien of judgments and other statutory liens, as in the instance of the bond given by a tax-collector and his securities.—*Hotchkiss' Dig.*

And surely, the coupling of the word "*pledged*" with the word "*bound*," can have no other effect than to impart greater certainty and emphasis to the expression of the legislative intention.

2d. That the "*notes or bills issued by or from said company,*" and for the redemption of which the railroad and its equipments are pledged and bound, must be construed to mean such bank-notes or bank-bills, lawfully issued, as are contemplated and intended by the Legislature to become the circulating medium, the paper currency of the country.

The making of such issues is no longer, since the prohibitory statute of 1818, a business in which any individual, partnership, or corporation, can engage, without special legislative license; whilst in regard to other branches of the banking business, such as buying and selling bills of exchange, drafts, checks, &c.; discounting notes and bills, receiving money on deposit, &c.; these are things against which there is no prohibitory statute or law, and which, consequently, may be done by individuals or companies, as of common right, and without first obtaining an act of the Legislature therefor. And as these things are permitted to everybody by the general law of the land, there is no reason why extraordinary security for debts incurred in this way by a bank, should be insisted on by the Legislature. But it is different in regard to the *bank-notes or bills proper*. These none can issue without special permission or charter; and it is clearly the duty, as it has been the custom, of the Legislature to exact, in behalf of issues of this kind, extraordinary security from those to whom authority is given to make such issues. See the *personal liability* clauses, in the various bank charters, from that of the Darien Bank in 1818, down to those of the Georgia Railroad and Central Railroad Companies, in 1835. This policy of exacting, in favor of bank-bills or notes, the security of a personal liability of the stockholders therefor, commenced simultaneously with that other policy, which prohibited such issues as a free trade, and restricted it to those specially licensed thereto by the Legislature.

The highest considerations of public good come in aid of the argument founded on the foregoing view.

Of all the claims of bank debts, that which most challenges legislative care and fortification against the dangers of discredit and depreciation, is the one which forms the common currency, the circulating medium of the country. So sensible was the Legislature of this, that in 1836, in granting the present company's bank charter, it superadded, in favor of this description of debts, a lien on the railroad, to the personal liability of the stockholders.

3d. To sustain the claim of the plaintiff in error to take money out of the fund in court, under his mortgage of August, 1842, would be clearly destructive of this statutory lien and priority of bill-holders, and is therefore inadmissible.

But, aside from all other reasons, the plaintiff precluded himself from any right of participation in this fund, by the notice which he gave (on the day of the sale) of his mortgage, and of his determination to pursue the road under it.

4th. To permit the plaintiff in error to take, as bill-holder, under the alleged deposit of bills as a collateral security for his mortgage-claims, would be enabling the company, after its insolvency, to put inferior debts on the same footing with bills, by simply giving such bills as a security, which would be a fraud on previously existing bill-holders, and tend to the entire defeat of their statutory lien.

5th. The distinctions as between equitable assets and legal assets are wholly inapplicable in the present case, because the provisions of the statute would be equally obligatory and controlling over the court, whether the assets were of the one or the other sort. But if the law of these distinctions could be applied here, it would be found to be clearly in favor of the position maintained by the defendants in error.—1 *Story Eq.* 553. In reference to the question of consideration, see *Cooper's Bankrupt Law*, 261-5, by which it is clear that the consideration which passed to the company, and for which the note or bill was originally issued, is a proper subject of inquiry, and not the consideration that passed between that person, or any second holder, and the purchaser from him.

WASHINGTON POE, for defendant in error, also addressed the court.

WILLIAM LAW, for the plaintiff in error, in conclusion.

We contend, in the first place, that the 11th section of the charter of the Monroe Railroad and Banking Company, ought not to be construed as creating a *lien* on the property of the corporation, because,

1st. Secret liens created by statute operating in restraint of a free alienation of property, are against the policy of the laws of the country; and such construction will only be given when the words are too strong to bear any other.—*Black vs. Scott*, 2 *Brook. Rep.* 330, 346.

The court may accomplish the legitimate purpose of the Legislature, by securing to the bill-holders of the corporation a priority of payment out of the entire fund or property of the corporation in their hands, re-sold or unencumbered by any *perfected lien* at the time of its failure to redeem.—*Conard vs. At. In. Com.* 1 *Peters*, 386.

2d. A contrary construction would fetter and tie up the property of the company to an extent which would disable them to accomplish the purposes of their creation, and prevent the sale of any of their property; whilst in the charter the Legislature recognize their right to sell, farm out, &c.—*Prince*, 314, sec. 1; *ib.* 369 sec. 1. The necessity of contracts for work on the road, and consequently of securities, by the company, was so apparent to the Legislature, that in the 8th section of the charter they except such contracts from the formalities prescribed as necessary to the validity of its contracts in all other cases.

3d. It is a general principle, that the stock and other property of private corporations is deemed a *trust* fund for the payment of the debts of the corporation; so that the creditors are deemed to have a lien, or right of priority of payment, &c. But as this corporation was created with a double aspect, to wit, banking and the construction of a road; and as a moiety of its capital was appropriated to each purpose, it became necessary to incorporate the 11th section in the charter, in order to subject the road-half to liability for the redemption of the bills.

The purpose was to put the whole capital and property on the same footing of liability for the redemption of the bills.

But it never has been supposed that the lien or priority of payment of creditors upon the trust fund, would follow and attach upon it in the hands of a *bona fide* purchaser for valuable consideration.—2 *Story's Eq. Juris.* 1252. The effect, therefore, of the 11th section, was to make

the road, and other property attached to it, equally with, and to the same extent as, the other moiety of its capital, a *trust* fund for the redemption of the bills; and to no greater extent.

It would be most singular that the Legislature should give a *lien* on one half of the capital, and leave the other half to the operation of the ordinary principal of a trust fund; and if the moiety was a *trust* fund for the creditors of the bank, the other moiety was likewise a *trust* fund for the creditors of the road; hence the necessity of the 11th section.

We contend, in the second place, that giving to this section the utmost latitude of construction for which our adversaries may contend, in its operation as a *lien*, still we say, that as the road was built by the labor, the money and the materials of the contractors, there never was anything in the corporation upon which that lien could attach, save the franchise, and the equity of redemption. The material structure was never vested in them, but subject to a condition fixed by contract, before the work was done or commenced. If they acquired any interest or title, it was so instantaneously out of them that no lien could attach.

Illustrate the argument by the case of dower. It is more than a lien; it is an interest in the thing, created, too, by law. Purchase and simultaneous mortgage by husband, no dower in wife, but subject to the mortgage.—3 *Paige*, 513, 515; 2 *Bland*. 242.

Purchase by husband, without mortgage, equitable lien of vendor supersedes dower. See same cases. Take the more analogous case of land purchased for the road, and equitable lien of vendor for unpaid purchase-money;—could this lien displace it?

What is the reason of this equity? A person who has gotten the estate of another, ought not to keep it, and not pay the full consideration money.—2 *Story's Eq. Juris.* sec. 12, 19, 20; 15 *Ves.* 340.

The statute gives a lien to mechanics, but that lien will not supersede the equitable lien of vendor, for purchase-money.—*Gillespie vs. Bradford*, 7 *Yerger*, 168; cited 2 *Wheeler's Dig.* title "*lien*." Nor will it supersede the lien of a mortgage given to secure a sum of money from a third party, at the same time the title was delivered, part of which money, so borrowed, was applied to the payment of purchase-money; the purchaser having paid part of purchase-money, and taken a bond for titles, before the mechanic was employed.—14 *Pick. Rep.* 49.

Now, it is conceded that the doctrine of equitable lien for purchase-money is limited to real estate. But it is equally true that a court of equity will find no difficulty in raising a like lien in the sale or transfer of personal property, when that is matter of agreement or contract.—2 *Story's Eq. Juris.* sec. 1231; 1 *Ves. Junr.* 478; 1 *Turn. and Russ.* 469, 475-6; 15 *Ves.* 340, 347, 349.

An agreement for a mortgage will create an equitable lien for the purchase-money of a slave sold.—1 *Bailey's Eq. Rep.* 223.

In these cases, the equity of the seller is higher and prior to any person claiming as a volunteer under the purchaser, or even of a purchaser for valuable consideration, with notice.

In this case, the equity of the contractors to be paid for their work and materials furnished, is better and prior to the bill-holders, who claim under and through their debtor, and can have no greater right to our property, without paying for it, than the debtor had. But we have super-

added to that equity a legal title. We took a mortgage:—can the lien of the bill-holders be permitted, in a court of equity, to overreach that mortgage thus sustained by a better and prior equity?

The rule is, that where the equities are unequal, the preference is constantly given to the superior equity.—1 *Story's Eq. Juris.* 64 d.

A *bona fide* purchaser will be protected, but not if he be a judgment creditor purchasing in the property of his debtor; because, in that case, as he pays no new consideration, he can have no rights but what his debtor had.—1 *Story's Eq. Juris.* 411 note; *Burgh vs. Burgh, Rep. Temp. Finch*, 28. In this case he must give way to superior and prior equity, and *a fortiori* to a legal title founded on a prior equity.

It is upon the same principle that the English doctrine of tacking rests, (a doctrine interfered with in America by our registry acts.) A third mortgage, buying in a prior judgment, may tack; whilst a judgment creditor, buying in a prior mortgage, may not. The reason is, that in the former case he lent his money upon the faith of the land, and has therefore a higher equity; in the latter, he was a general creditor.—1 *Story Eq. Juris.* 416. And thus it is that a specific lien is always more favored in equity than a general.—1 *P. Wms.* 278; 2 *Ves. Sen.* 262-3.

What, then, shall hinder the court from protecting these mortgages? It is replied, the statute; but it is a principle that no statute shall exclude all equity.—2 *Roll. Rep.* 500; 2 *Vern.* 236, 750; 1 *Ves. Sr.* 66.

But it is said the bill-holders took the bills upon the faith of the statutory lien, and their equity is also very high, and prior to ours.

It is very high; but neither higher nor prior, nor as much so as ours, if the preceding argument be true; because, before theirs attached, before there was anything in the debtor upon which it could attach—nay, before we parted with our materials and bestowed our labor we took our security.

But again: it was our work, labor, money and materials which conferred its value on the road. And the principle is, in the case of improvements, repairs, &c., where the party making them has acted *bona fide* and innocently, and a substantial benefit has been conferred on the owner, equity will give a lien for such improvements.—2 *Story*, sec. 1236, 1237, 1239, sec. 5; *Dana*, 578, cited 2 *Wheeler's Dig.* 118, sec. 10. The maxim is, *jure naturæ equum est, neminem cum alterius detrimento et injuria fieri lucupletiozem*. If this principle is true in its application to the owner, does it apply with less force to the creditors, who take only what he had? Receiving the benefit of these improvements, they are bound equally with the owner to pay for them. This is the highest equity and the highest morality.

If the owner would be bound, *ex æquo et bono*, to pay for such improvements, all taking the benefit under him as volunteers, are equally bound. Creditors are not strictly volunteers, but they are *quasi* such upon such a question as this; they are not purchasers for valuable consideration paid at the time.—See 1 *Story*, sec. 411, note, already referred to, as to a judgment creditor purchaser. So in the case of voluntary conveyances, in payment of a debt, although they can scarcely be called voluntary.—1 *Story*, sec. 433. Yet as no new consideration is paid, they are in a sense volunteers, and so considered in the comparison with *bona fide* purchasers & valuable present consideration.

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I now take the broad ground of a more comprehensive equity, and insist that a court of chancery will remove, displace or supersede a *general lien*, whether created by statute or not, to protect the rights of those who are entitled to a prior equitable interest in the thing. In support of this principle, we rely on the following authorities, viz.: 1 *Paige*, 128-9; 2 *Paige*, 266-7; 3 *Des. Rep.* 74; 2 *Sergt. & Rawle*, 11; 2 *Walsh. C. C. Rep.* 69; 3 *Binn.* 347, note; 1 *Eq. Cas. Abridg.* 320; 1 *Pr. Wms.* 282; 3 *Ves. Jun.* 576; *Sug. Vend.* 336.

And now there is another view in which I desire to present this case, which I think will give an additional force and weight to the foregoing principle.

Generally, when the Legislature creates a lien by statute, they also prescribe the mode by which it can be enforced at law. In this case they have omitted to do so. The question then occurs, how can the bill-holders enforce their lien at law? The only conceivable mode would be, by maturing their claims into judgments, and by a levy and sale of the road.

But it has been decided, that the public have an interest in railroads, that they are public roads or improvements, when constructed under acts of the Legislature, notwithstanding the tolls they produce are appropriated to the persons by whose capital and enterprise they have been constructed. In the construction of such roads, the public are considered as acting through the agency of individuals.—*Lex. & Ohio R. R. vs. Applegate*, 8 *Dana*, 295; 4 *Barbour & Har. Dig.* 556.

Now, in that view of the subject, can it be supposed, that each bill-holder, getting judgment, might proceed to sell any part of this road in fractions, at different sales, in the different counties through which it passes, to different purchasers, and thus entirely defeat the rights and interests of the public, and the objects and intentions of the Legislature in granting the charter? Such a construction of the legislative act would be suicidal of the work they had chartered. And again, as no preference is created as among the different bill-holders, would one man, by getting a judgment, and forcing a ruinous sale, be permitted to defeat the rights and interests of all the other bill-holders? And would those who had judgments be permitted to take the whole fund in preference to other bill-holders without judgments? And yet a court of law, in the distribution of the fund, could only regard the legal priorities.

These numerous difficulties show that this lien can only be enforced in equity; and the action of the Superior Court, in assuming the jurisdiction in this case in chancery, could alone be predicated on the position we assume.

These bill-holders have then only an equitable lien; and being compelled to go into equity, the fund they bring there is equitable assets, entirely under the control and rules of the chancery in its distribution, so far as their claim is concerned.

What are equitable, and what are legal assets? See 2 *Smith's Chan. Pr.* 273-274. There is abundant room, then, for the court to look to and consult the real equities of the parties.

The learned judge in the court below felt the equities of the complainants in error; and said if he had controlled the case in the first instance would have protected them by a sale of the road, which they could have by itself, apart from the other portion. That concession yielded

thing: for the fund was still in his hands, and the equity of the plaintiffs in error fastened upon the conscience of the court of chancery, and bound it to relieve through that fund.

If exact justice could not be done, he should have approached it as nearly as possible.

3d. I proceed to consider, in the third place, whether the plaintiffs in error are not entitled as bill-holders? The contract for additional collateral security was made on the same day with the mortgage. It is true, the packages were not delivered, nor the schedule taken, until January, 1845; but no maxim is better understood in equity, than that it looks upon what is agreed to be done, as done; and when the act is done, it has relation back to the time of the contract.—1 *Story Eq. sec. 64, g; 3 Wheat. 563, 577.*

The company had no right to touch these bills after the contract; and in the events provided for by it, the plaintiffs in error had an absolute right to take possession and use them. The bailee, or trustee, in this case, having received the schedule of the packages, and left them for safe keeping as a special deposit in the bank, was an acceptance in law by him of the trust, which authorized an action at law by the plaintiffs in error against him for these bills.—2 *Story's Eq. sec. 1041.* And although some doubt has been expressed as to the action at law, it is certain a remedy would exist in equity.—*idem, and Com. Dig. Chancery, w 4; id. 2 a. 1; Scott vs. Parker, 3 Mur. Rep. 658-9.*

If this contract was legally consummated, and the bills pledged for the security of the debt, so as to entitle the pledgee to hold and use such bills for his indemnity in case the debt is not paid, such bills are to be considered issued and in circulation.—9 *Paige, 14.*

We have endeavored to prove by the contract and acts of the company and trustee, the former part of the foregoing proposition; the latter part is the conclusion of law, which the authority establishes.

We contend, upon the following authorities, that the bill-holders should be paid in proportion to the consideration actually paid by them for their bills.—2 *Smith's Chan. Pr. 265; 15 Mass. Rep.; 4 Paige Rep.*

By the Court—WARNER, Judge.*

This case comes before the court on a bill of exceptions and writ of error to the decision of the Superior Court for the county of Bibb, distributing the proceeds of the sale of the property of the Monroe Railroad and Banking Company. It appears, from the record in the cause, a bill was filed on the chancery side of said court, at the instance of the company, to have the road and its appurtenances sold for the benefit of its creditors, and at May Term, 1845, a decree was made by the court, ordering a sale of the road, from Macon to its terminus in the county of De Kalb. This decree declares, that the creditors of said company, "any controversy should arise respecting their claims, should litigate

* LUMPKIN, Judge, being a bill-holder of the Monroe Railroad and Banking Company, gave no opinion in this case. After the judgment of the court was delivered, the same being adverse to his interest, Judge L. gave it his public approbation; desiring and designing to share with the court the responsibility attaching to the opinion of the

Collins vs. The Central Bank et al.

among themselves, in respect to all objections which would, or might have been, available against them by said company, if said sale had not been made in relation to matters of set-off, and whether they be subject to objections on account of the statute of limitations, non-performance of contracts, or other cause; *embracing the quantum of consideration paid for the claims, or any of them*, and also, that the *liens* claimed by the respective creditors, be then and there also investigated and adjudicated."

In pursuance of this decree, the court, at its May Term, 1846, proceeded to distribute the fund, arising from the sale of the property, among the several claimants, one of whom was Collins, the plaintiff in error, and his co-contractors, who excepted to the decision of the court below.

First—"Because the court ruled and decided that the clause in the charter of said Monroe Railroad and Banking Company, declaring that said road should be pledged and bound for the redemption of the bills or notes of said company, created a specific and paramount legal lien on said road over all other liens."

In the year 1833, the Legislature granted a charter to the Monroe Railroad Company, to construct a railroad from Macon to Forsyth. In the year 1835, another act was passed amending and reviving the act of 1833; and, in the year 1836, another act was passed, amending and extending the provisions of the original charter, and conferring upon the company banking privileges. By the 22d and 23d sections of the last-mentioned act, the charter of the Monroe Railroad Company is declared to be continued in force, in all matters in which it does not conflict with the provisions of the latter act; the two acts, therefore, when not in conflict, will be considered as one act, and construed accordingly.

By the 11th section of the amended charter it is declared: "The railroad to be built *by said company*, from Macon to Forsyth, together with all the revenue arising therefrom, and all the property, equipments and effects therewith connected, shall be *pledged and bound* for the redemption of the notes or bills, issued by or from said company, and for the redemption of the same."—*Prin. Dig.* 372. The words "*pledged and bound*," used in this section of the charter, taken in their common acceptation, or in their legal signification, leave no doubt upon our minds as to the *intention* of the Legislature. The road to be built by *the company*, and all the rights of the company connected therewith, which would, in law, be subject to the payment of the debts of the company, were intended to be pledged and bound for the redemption of the notes or bills issued by the company; and in our judgment, so much of the proceeds of the sale of said road, built *by said company*, and equipments and materials furnished *by them*, ought first to be applied to the claims of the bill-holders. That the bill-holders, under that section of the charter, acquired all the rights which belonged to the company, but no other, and to that extent only, we are of the opinion the decision of the court below was correct.

This brings us to the consideration of the 2d, 3d and 4th grounds of exception taken to the decision of the court below, which are all mainly included in the 4th exception, which is: "Because the court ruled and decided that the work and labor done on said road, and materials and iron furnished and put on said road by the contractors, to whom said mortgages were given, which said work was done, and materials f

nished, after the *insolvency* of said Railroad and Banking Company, was liable and subject to the payment of the bills of said company, in preference to said mortgages or debt, for said work and materials."

The whole road, together with all the equipments, was sold, and the proceeds of the sale are now in the hands of a court of equity for distribution: the question is, whether the contractors, who done work and furnished materials on the road above Griffin, after the *insolvency* of the company, ought to have been postponed, to the bill-holders, to the extent of the *relative value* of such work and materials, to the whole fund in hand. The paramount object of the Legislature, in granting the charter to the company, was, to advance the public interest by the construction of the road. The *completion of the road* was the inducement for the grant; the banking privilege was conferred on the company as a *means* to enable them to carry out this great work of internal improvement, for the benefit of the public.

The record, however, informs us, that before the completion of the road, the company became *insolvent*, whereby they were wholly unable to go on and finish the work, and the objects of the Legislature were about to be frustrated. During this state of things, the plaintiff in error and his co-contractors enter into a contract with the company to complete the road, from Griffin to the terminus in De Kalb, furnish iron, equipments, and all necessary materials. This contract was entered into on the 2d day of August, 1842, and by one clause thereof, it was stipulated, "that the whole of the Monroe Railroad, from Macon to the point of junction with the Western and Atlantic Railroad, and all and every part thereof, and all of the appurtenances, engines, tenders, cars, shops, tools, implements of every kind connected, *or to be connected*, and all real estate to the same appertaining, and all other effects to the same appertaining, shall be, and is, hereby conveyed and vested in the said parties of the second part, *in full title and estate, until all the dues and payments, to which they shall become entitled under this contract, shall have been fully met and satisfied.*"

By the 11th section of the original charter, (*Prince Dig.* 317,) the company have the right, "when they see fit, to rent, or farm out, any part, or the whole of their said exclusive right of transportation on said railroad, with the *privileges thereof*, to any individual or individuals, or other company, subject to the rates above mentioned." The company, under this clause in the charter, would not have had the right to have rented or farmed out their privileges, granted by the Legislature, so as to have *defeated* the object and intention thereof: but the farming it out to the plaintiff in error and his co-contractors, for the purpose of constructing and completing the road, was, in our judgment, legitimately carrying out the views and intentions of the Legislature, in granting the charter to the company.

The company, in consequence of their *insolvency*, were unable to complete the road, and it is, together with the privileges thereof, farmed out, or let, to the plaintiff in error and his associates, for the purpose of having the same completed to the terminus of the State road in De Kalb; the contractors having *the full title and estate therein, until all the dues, and payments, to which they shall become entitled, under their said contract, shall have been fully met and satisfied.* In pursuance of this contract,

intiff in error, and his associates, expended large sums, in and

about completing said road, from Griffin to the terminus of the State road in De Kalb; furnished several tons of railroad iron and other materials; done several miles of grading; furnished timber, and built several miles of superstructure;—all of which was sold, with the road, and contributed to swell the fund, now in the hands of the court for distribution; but, under the decision of the court below, were denied any participation whatever in the distribution thereof, notwithstanding their work and labor, materials and equipments furnished by them, were sold under the decree of the court, and thereby contributed directly to increase said fund; the court below being of the opinion, the bill-holders had a prior lien thereon, to the contractors who done the work on the road, furnished iron, materials and equipments, as before stated, from Griffin to the terminus of the State road in De Kalb.

We have already shown, the bill-holders had a prior lien, under the 11th section of the amended charter, to the proceeds of the sale of so much of the road as was *built by the company*, materials and equipments furnished *by them*; nor could the company, by contract made in 1842 with the plaintiff in error and his associates, defeat such lien, because the lien of the bill-holders was of prior date to the contract, on so much of the road as was built, materials and equipments furnished *by the company*; that portion of the road, however, built by the plaintiff in error and his associates—the materials and equipments furnished by them, on that part of the road above Griffin, to the terminus of the State road—*was not built by the Monroe Railroad and Banking Company*; nor were the materials and equipments furnished by the plaintiff in error on that portion of said road, furnished by “the company;” nor was the company entitled to the same, until payment was made therefor, according to the stipulations of the contract, made on the 2d August, 1842. Although it was not competent for the company to make a contract, in 1842, to defeat the lien given by statute to the bill-holders, on that part of the road built *by the company, up to the time of its insolvency*; yet it was competent for the company to carry out the intention of the Legislature, in the completion of the road, by making a contract which would give the undertakers a lien on such portions of the road as such undertakers should thereafter build, *until they were paid therefor*. It was competent for the company to stipulate, by *express agreement*, the contractors should have a *lien* on that part of the road which they contracted to build, to the extent of the work done, and materials furnished, until payment was made by the company for such work and materials.—*Kirkman vs. Shawcross*, 6 Term. Rep. 14; *Green vs. Farmer*, 4 Burrow Rep. 2220; 1 Story’s Eq. 483, sect. 506. In *Green vs. Farmer*, Lord Mansfield says: “The convenience of commerce and *natural justice*, are on the side of liens, and, therefore, of late years, courts lean that way. 1st. Where there is an *express contract*; 2dly. Where it is *implied* from the usage of trade; or 3dly. From the manner of dealing between the parties in the particular case.”

This contract, made on the 2d of August, 1842, between the company and the plaintiffs in error, giving the latter a lien on that part of the road they should build, until paid for the same, and materials furnished, does not at all conflict with the lien created by the statute on that part of the road built *by the company*; nor would the company have been entitled to that portion of the road, built by the contractors

Griffin, until payment made to them therefor. Certainly, the bill-holders, who are the creditors of the company, cannot be considered as standing, at least in a court of equity, in a better condition than the company under whom they claim. If the company could not appropriate the road, built by the contractors, to their own use and benefit, until payment for the work and materials, on what principle is it the bill-holders, claiming under and through the company, can justly claim, in a court of equity, to have exclusively appropriated to their benefit, the proceeds of the sale of such portion of the road and materials?

We cannot bring our minds to the conclusion; the Legislature intended to create a lien on any portion of the road, materials, or equipments, in favor of the bill-holders, that was not built, or furnished, *by the company*. It was not intended to violate that principle of *natural justice* which exists in favor of those whose labor constructed the road, and who furnished materials and equipments therefor, after the *insolvency* of the company, under an *express agreement*, that those who should perform such labor, and furnish such materials, should have vested in them the full title and estate thereto, until all the dues and payments to which they should become entitled, under such agreement, be fully met and satisfied. This agreement, too, was calculated to carry into effect the leading object of the Legislature, in completing the road, when the company, to whom the charter was granted, by its hopeless insolvency, forbid the accomplishment of the just expectations of the public in that regard. Nor did the bill-holders take the bills on the *faith* or *credit* of that portion of the road built, or materials furnished by the plaintiff in error, or his associates, under the agreement of 23 August, 1842; for the record shows the company was *wholly insolvent* at the time, and if the road had been then sold, the fund would not have been increased, by the labor and materials furnished thereon by the plaintiff in error; but, on the contrary, would have been diminished to that extent.

The effect of the decision of the court below is, to place the bill-holders, with respect to the road above Griffin, built by the plaintiff in error, in a better condition than the company under whom they claim; for the company could not, under the agreement, be considered the *owners* of that portion of the road, materials and equipments, built and furnished by the plaintiffs in error, until they had *paid for the same*. On what principle of equity, or of morals, is it then, that the bill-holders, who claim under or through the company, can appropriate to themselves the proceeds of such portion of the road and materials, without first paying the plaintiff therefor? Will it be answered, The statutory lien, under the 11th section of the charter, confers the right? That section only gives the bill-holders a lien on so much of the road, materials, equipments, &c., as *shall be built and furnished by the company*; and, we have already shown, that portion of the road above Griffin, built by the plaintiffs in error, and the materials and equipments furnished thereon by them, was *not built by the company*, nor were the materials or equipments furnished *by the company*, nor did that portion of the road, materials, or equipments, belong to the company, until payment was made therefor, in pursuance of the agreement, which is not pretended to have been done.

asmuch, therefore, as that portion of the road above Griffin, built by the work and labor of the plaintiffs in error

The original decree, ordering the road to be sold, further directs: "that the creditors of the company, if any controversy should arise respecting their claims, should then litigate among themselves, in respect to all objections, which would, or might, have been available against them by said company, if said sale had not been made, in relation to matters of set-off; and, whether they be subject to objection on account of the statute of limitation, non-performance of contract, or other cause, embracing the *quantum of consideration paid for the claims, or any of them*; and, also, that the liens claimed by the respective creditors be then and there investigated and adjudicated."

One of the grounds of application to the court for a sale of the road was, that the company was *insolvent*, and unable to pay its debts. With the intent to measure out justice to the respective claimants as far as practicable, knowing there would not be sufficient to pay all, the court declares the claimants on the fund shall litigate among themselves, and that the liens of the respective creditors should be investigated and adjudicated by the court, "embracing the quantum of consideration *paid for the claims, or any of them.*" It is under the authority of the decree, made for the sale of the road, the court proceeds to investigate and adjudicate the liens, claimed by the ——— on said fund.

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as directed by the decree? Is one portion of the decree more binding on the court, in making a distribution of the fund, than another; and if so, on what principle is it made more binding?

Independent of the decree itself, we are of the opinion, the clear equity of the case is in favor of distributing the fund among the respective bill-holders, in proportion to the *quantum of consideration* paid for the bills by the respective holders thereof. Although the funds in the hands of the court cannot, perhaps, be *technically* considered as equitable assets, yet, being raised under the decree of a court of equity, and under its control, a proper regard should be had to the fundamental principles of equity in making a distribution of it. If the fund was sufficient to pay all the claimants, there would be no difficulty; but there are many who must go unpaid. Shall the bill-holder, then, who paid but ten cents in the dollar for his bills, exhaust the whole fund, or a majority of it, by receiving the full amount of his claims: that is to say, receive one hundred cents out of the fund for which he paid only ten; while he who paid one hundred cents in the dollar for his claims gets no more. In other words, has he who paid but ten cents in the dollar for his bills, the same equitable claim on the fund as he who paid one hundred cents in the dollar, when the fund is not sufficient to pay all? In *Davison vs. Watson*, the plaintiff, a bond creditor of the testator, compounded with the other creditors, and they executed an assignment to him of their debts. On the hearing, the usual decree was made: "The legatees obtained an order on petition, that the minutes of the decree should be added to, by directing an inquiry, whether the said plaintiff had purchased from, or compounded with, any of the creditors of the testator for their debts, and what *consideration was really paid, or given, for such debts*; and a declaration, that what the master should find to have been *actually advanced, paid or allowed by the said plaintiff for such debts, and no more*, was to be allowed to him in respect thereof."—2 *Smith Chan. Prac.* 265.

In making an equitable distribution of the fund, therefore, under the original decree, amongst the bill-holders, we are of the opinion, the *quantum of consideration* paid therefor by the respective claimants, at the time they become the holders of said bills, should constitute the value of their claim on the fund; and not the value received by the bank for such bills, at the time of the emission of the same.

The sixth and last exception is: "Because the court erred in deciding that the said bills set apart as collateral security, to secure the work, labor and materials found and furnished on said road, had not been legally issued by said bank, and therefore could not claim any of said fund." On looking into the manner in which this security was taken by the plaintiff in error and his associates, as disclosed by the record, we are decidedly of the opinion they are not entitled to receive any portion of said fund as *bill-holders*. The bills were not issued, as was contemplated by the charter of the company, and the manner in which they are now attempted to be used for the purpose of placing the holders thereof on the same footing as the holders of bills, issued and put in circulation as money, according to the terms of the charter, cannot receive the sanction of this court: to permit it would be, in our judgment, to sanction a fraud on the rights of those bill-holders, whose bills were legitimately issued, and put in circulation as money, according to the terms and provisions of

the charter. On this ground of exception taken, we most cheerfully concur in opinion with the court below.

This cause came on to be heard on the transcript of the record from the Superior Court of the county of Bibb, and was argued by counsel: Whereupon it is considered and adjudged by the court, that the judgment of the court below be reversed, on the following grounds: First, Because it is the opinion of this court, that the bill-holders had a paramount lien only on the fund, raised by the sale of the railroad from Macon to Griffin, and so much only of the road from Griffin to the terminus in De Kalb, as was built by the Monroe Railroad and Banking Company, prior to the 2d day of August, 1842; and that the contractors of the second part, under the agreement of the 2d of August, 1842, in the record mentioned, had a prior and superior equity to the bill-holders, to be paid out of said fund, in proportion to the *relative* value of the work done by them on said road, and materials and equipments furnished, between Griffin and the terminus of the road, in the county of De Kalb; and that the court below committed error, in excluding said contractors from any participation in said fund, to the extent of the *relative value* of their claim for work and labor done, and materials and equipments furnished said road, between the city of Griffin and the terminus of the road in De Kalb as aforesaid.

It is further the judgment of this court, that the *relative value* of the work and labor done, and materials and equipments furnished said road, by said contractors, between the places last aforesaid, be apportioned by three commissioners, to be appointed by the court below, with power to hear evidence in relation thereto; and make report thereon, within such time as to the said court, shall be deemed expedient.

Second, Because the court below committed error in deciding, "that the bank-bills should take, each in proportion to the value received by the bank for it, at the time of its emission by the bank." It being the opinion of this court, that each bank-bill should take in proportion to the *quantum of consideration paid therefor* by the holder, or claimant on the fund; and that such holder, or claimant, should state the quantum of consideration actually paid therefor, on oath in writing, with the right of other contesting claimants for said fund, to traverse the same.

No. 66.—LEWIS BULLARD, plaintiff in error, vs. THE CENTRAL BANK OF GEORGIA, defendant in error.

A certificate, setting forth that the holder had, on deposit in the Monroe Railroad and Banking Company, \$300 of its notes, which would be paid to his order thereon, with 8 per cent. interest per annum, is not of equal dignity or priority, under the charter, with the bills of the bank, in the claim of money raised by the sale of the railroad.

Such certificate furnishes evidence of a new contract, by which the holder surrendered his bills to the bank, in consideration of the undertaking on its part to pay him their amount with 8 per cent. interest per annum. The bills thus surrendered, and for which the certificate was taken, may have been re-issued by the bank, in other hands may constitute a separate claim upon the fund raised from the sale of the road.

Evans vs. Rogers.

provides, that if the corporation shall refuse payment of *its bills* in gold and silver coin, the *holders of such bills*, on demand made, shall be entitled to receive interest, at the rate of ten per cent. per annum in addition to the ordinary legal interest. The plaintiff in error is not the *holder of the bills of the bank*; he gave up to the bank his bills, and made a *new contract*, of which his certificate furnishes the evidence, whereby he was to receive interest, at the rate of *eight per cent.* per annum.

The eleventh section of the charter gives, to *bill-holders only*, a lien upon the road and equipments. For aught that appears to the contrary, the identical bills deposited by the plaintiff in error have been re-issued by the bank, and now in the hands of some claimant, for a portion of the fund now in court. We cannot consider this a *special deposit* of the identical bills; but, on the contrary, are of the opinion, the bank was at liberty to use them; certainly, the plaintiff in error, by his own voluntary act, parted with them. Doubtless he thought, at the time, he was making the best arrangement for his own interest, by surrendering the bills to the bank to be used by its officers, and taking a certificate of deposit drawing interest; and must now abide the result of his contract made with the Bank: we cannot consider him as a *bill-holder*, within the intent and meaning of the eleventh section of the charter.

Let the judgment of the court below be affirmed.

No. 67.—JOHN P. EVANS, plaintiff in error, vs. BERRY ROGERS, defendant in error.

Whenever proceedings in court are irregular, application to set them aside should be made in the first instance. If the party after discovering the irregularity proceed himself and take subsequent steps in the cause, or lie by and suffer the other party to do so, the court will not assist him.

A verdict may be amended so as to conform to the declaration, if the error be apparent on the face of it.

The allowance or disallowance of amendments in pleadings are matters within the discretion of the court, and will not be interfered with except in extreme cases.

Neither the act of 1826, 1831, 1839, 1840, nor 1845, passed for the relief of securities and endorsers, give the control of executions to endorsers who have paid off the same against prior endorsers, except such executions as have issued on judgments, founded on bankable instruments.

This cause grew out of an affidavit of illegality.

On the 11th day February, 1841, a judgment was rendered in Bibb Superior Court, at the instance of Uriah J. Bulloch, against Rufus K. Evans as maker, and John P. Evans, the plaintiff in error, and Berry Rogers, defendant in error, as endorsers for the sum of \$308 15, principal, besides interest and costs. Berry Rogers, defendant in error, who was the last endorser, was compelled to pay over the full amount of said judgment. It appeared from the record that, afterwards in the

Evans vs. Rogers.

Superior Court of the said county of Bibb, at November Term, 1842, the said Berry Rogers obtained the following order of said court, granting him the control of said judgment as follows, to wit:

"URIAH J. BULLOCH, vs. RUFUS K. EVANS, JOHN P. EVANS, and BERRY ROGERS.	}	Judgment, Bibb Superior Court, 11th February, 1841. Principal, ... \$308 15 Int. to Judgment, ... 26 70 Costs, ... 17 50
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"It appearing to the court that Berry Rogers, the last endorser on the note, the foundation of the above judgment, has been compelled to pay over the full amount of the above judgment, and praying for his remedy against the other endorser, John P. Evans, under the act of the 25th December, 1840, and by testimony produced in court at this term showing that John P. Evans, though an endorser upon the note on which the above judgment was founded, was the principal debtor at first, it being his own debt; it is therefore ordered, that the said Berry Rogers have the use and control of the above judgment for the whole amount of principal, interest and costs against said John P. Evans, to reimburse himself as security, and that said judgment be enforced in his favor against the other defendant, Rufus K. Evans, for only one-half of the principal, interest and costs due on said judgment." Afterwards, on the 16th day of March, 1846, a *capias ad satisfaciendum* was issued from said judgment at the instance of said Berry Rogers, the same issuing in the name of Uriah J. Bulloch, as plaintiff; and the said Rufus K. Evans, John P. Evans and Berry Rogers, as defendants.

Afterwards on the 9th day of April, 1846, John P. Evans, the plaintiff in error, was arrested under and by virtue of said writ of *capias ad satisfaciendum*, by the sheriff of the said county of Bibb: Whereupon he made and filed an affidavit of illegality, alleging that the said execution was proceeding against him illegally on the following grounds, to wit:

1st. That if any such judgment appeared on the record of said court as was mentioned in said *ca. sa.*, the same was not founded on the verdict of a jury, or the confession of the defendants, but was entered up by counsel for plaintiff, of his own voluntary accord, and without authority of law, and was therefore absolutely null and void.

2d. That the jury having rendered against defendants a verdict to this effect or in these words: "*We, the jury, find for the plaintiff ten and eight dollars, with interest and cost of suit, (signed) Leonard Adams foreman,*" which has not been appealed from or altered, counsel entered up judgment for the amount first above stated, which was illegal, because the judgment did not follow the verdict of the jury in any particular.

3d. Because, several terms after the rendition of the verdict, plaintiff's counsel moved and obtained an order to correct said verdict; the effect of which was to make a new verdict, which was grossly illegal and absolutely null and void.

4th. Because said judgment had been paid off and discharged in full by one of the co-defendants, and the *fi. fa.* returned to the office satisfied in full.

5th. Because defendant (plaintiff in error) had once before been ar-

rested on said *ca. sa.* and discharged, which discharged the debt in full, to wit: May Term, 1842, of said court.

6th. Because, again afterwards defendant (the plaintiff in error) was arrested and again discharged.

7th. Because the said Rufus K. Evans was also arrested, and gave bond and security, and no action had been had on said arrest and proceedings.

8th. Because, in February, 1843, the defendant (the plaintiff in error) was arrested at the instance of his co-defendant, Berry Rogers, (the defendant in error,) by virtue of an order, a copy of which was endorsed on the back of said *ca. sa.*, being the order of court hereinbefore recited, which said order was manifestly absurd, and the arrest under it illegal, on the following grounds: The act of 1840 has no reference to the case of endorsers, but refers to co-securities, the act giving a remedy to endorsers not reaching this case; the making of a party to a note the maker of the note, when he was endorser only, violated the contract of the parties, and established a new one in its stead made by the court and not by the parties; and again, the control of the judgment gave to Rogers, (the defendant in error,) the right to enforce the whole principal, interest and costs out of John P. Evans, (the plaintiff in error,) and also one-half more out of Rufus K. Evans, which was absurd.

9th. Because, the court had decided that the above-recited order could have effect only against the property, and not the person, of the endorser, John P. Evans, (the plaintiff in error.)

10th. Because a *ca. sa.* could not issue against the said John P. Evans, in said cause.

It appeared from the record, that the verdict was as stated in the second ground of illegality; but entered on the minutes for *three hundred and eight dollars and fifteen cents*, which was the amount of the note sued on. The record showed a demand of \$308 15, without any credits or sets-off.

An order was subsequently taken, correcting the verdict, so as to make it for the above sum.

It appeared, from an entry on the original *fi. fa.*, that Berry Rogers, the defendant in error, and who was last endorser upon said note, had paid off the full amount of the debt, principal, interest and costs, amounting to some \$352 00.

It appeared that the plaintiff in error had before been arrested upon a *ca. sa.* issuing from said judgment, and discharged in the court below, at a previous term, on the ground that under the said order giving control to the defendant in error, he could not have execution against the body of the said plaintiff in error.

The affidavit of illegality came on to be heard in the Superior Court of said county of Bibb, before Judge Floyd, at May Term, 1846, when counsel for the defendant in error moved to dismiss the said affidavit of illegality, on the ground that there was no cause of illegality shown in any of the several grounds stated therein, which motion, after argument and consideration of the facts appearing of record in said cause, was sustained by the court below; and the affidavit of illegality by order

thereof was dismissed; to which the counsel for the plaintiff in error excepted.

C. J. McDONALD, for the plaintiff in error, insisted:

1st. The judgment did not follow the verdict, and was therefore erroneous and void.

2d. The verdict could not be amended after judgment.—1 *Sellen*, 481.

3d. The act of 1840 gives a remedy to a surety against his co-sureties only, and not against the principal.—*Pamphlet of 1840*, page 173. It gives no remedy to an endorser.

It is the endorser of such note only as is payable at a bank, or deposited in bank for collection, that is entitled, on payment of a judgment by him, to control it against his co-endorsers; and then it can be controlled against the property only and not the person.—*Pamphlet of 1839*, p. 58.

4th. The court has decided that the judgment can be enforced against the property only of the defendant.

5th. The surety obtaining the control of the judgment against his principal, cannot enforce it against his person, but against his property only.—*Prin.* 461, 470; *Pamphlet of 1839*, p. 58.

T. P. STUBBS, for the defendant in error.

NISBET, Judge, having been of counsel, gave no opinion.

By the Court—LUMPKIN, Judge.

The court does not feel called on to go at great length into all the questions arising out of this *chaotic record*. A more reprehensible example of vexatious litigation has not come under its review.

As to the want of power in the court to amend the verdict, and the nonconformity of the judgment to the verdict, these objections came too late, after five years' intervening altercations between the parties. In all cases of irregularity in the proceedings in a court the party aggrieved should apply as early as possible; and if he either proceed himself, or lie by and suffer the other party to proceed, the court will not assist him.—*Tidd's Prac.* 435. Lord Kenyon, in the case of *Pearson vs Rawlings*, (1 *East*, 77,) declares this to be the universal practice of the court: "That where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it. Justice requires, that this rule should be general in its operation, having in view the advancement of right." And in *De Argent vs. Vivant*, (1 *East*, 335,) the court say, "that any irregularity must be taken advantage of in the first instance, and that it is considered as waived by the party, who voluntarily does an act, submitting to the proceeding instead of taking steps immediately, to avail himself of the irregularity, which ought always to be done in the first instance."

We hold, therefore, that it is too late for the defendant, below, to insist that the execution, which he is resisting, is founded on no verdict.

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or judgment, after he has, for a series of years, been contesting its payment, and joined in sundry collateral issues to arrest its progress.

We are by no means convinced, that the court below had not power to amend the verdict. The ancient rigor of the laws is greatly abated, and the late practice is, to allow great latitude in amending the pleadings.—2 *Str. Rep.* 197; 1 *Cain. Rep.* 381, 583; 15 *Johns. Rep.* 318; 7 *Mass. Rep.* 358; 11 *ib.* 157; *Doug.* 376, 746; *Bay's Rep.* 496; 1 *Cow. Rep.* 133.

In the case of the *Bank of Pennsylvania vs. Condy*, (1 *Hill Rep.* 209,) the Court of Appeals decided, that a verdict could be amended, so as to conform to the declaration, if the error be apparent on the face of it; and Earle, Justice, in delivering the opinion of the court, says: "It is the constant practice here to amend proceedings, in any period of their progress, to preserve their symmetry, and make them conformable, if anything appear by which the amendment can be framed. Writs, declarations, judgments, and executions, are every day amended, up to the time of final satisfaction. And there can be no reason why a verdict should not be also."—See, also, *Brown vs. Hillegas*, 2 *Hill's Rep.* 447.

The court below having ordered the amendment to be made, and the judgment corresponding with the note, as set forth in the record, it is a very grave question, whether it is matter for which a writ of error will lie.—See *Chirac vs. Reinicker*, 11 *Wheat.* 280. The Supreme Court of the United States has repeatedly decided, that the allowance or disallowance of amendments is a matter purely of discretion, and that the refusing or granting amendments of pleadings, affords no grounds for a writ of error.—*The United States vs. Buford*, 3 *Peter's Rep.* 12. The right to interfere, therefore, must be derived, exclusively, from the statute creating this court. On these grounds, then, in the assignment of errors, we have no difficulty. The material question to be considered is, has Berry Rogers, the last endorser on the note, which is the basis of this case, the right to enforce a *ca. sa.* against the body of John P. Evans, a previous endorser on the same paper, and co-defendant with himself in the action? Having paid off the debt to Uriah J. Bulloch, the plaintiff, he claims to exercise this right by virtue of an order passed in November, 1842, giving him the control of the judgment, to reimburse himself out of the previous parties. That order purports, on the face of it, to be founded on the act of 22d December, 1840, passed for the relief of securities. It is supposed that there is a fatal omission in the statute, which renders it nugatory for any purpose. But waiving that defect, it can never be made to extend to the present case. Its sole object is to enable a security, who has discharged an execution, to control it, against his co-security, for contribution. But Evans and Rogers are *endorsers* and not *securities*. Besides, Rogers is seeking, under this order, not to collect *one-half* of the demand, out of John P. Evans, as a *co-security*, as being the proportionable part equitably due by him, but to compel him to pay the *whole* as *principal* in this contract. This single view is fatal to the case in its present attitude.

The order under which Rogers claims is most anomalous in its character. It changes the legal liability of all the parties to the instrument, as fixed by its form. It not only converts Rogers into a security, upon

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a contract on which he appears as endorser, but makes John P. Evans, the previous endorser, the maker of the note, and Rufus K. Evans, the principal, a co-security; and all this transmutation is wrought, on motion, in a proceeding at law, and without notice to any of the parties concerned!

It is urged, however, that this order was granted long anterior to the organization of this court, and, being *res adjudicata*, is beyond its reach. So, too, is the subsequent judgment of the same court which passed it, declaring that the order did not authorize Rogers to sue out a *ca. sa.* against the body of John P. Evans, but that it only gave him the control of the *fi. fa.*, to reimburse himself out of his property. And we know of no statutory right which Rogers had at that time, independent of that order. If the rule of *transit in rem judicatam* is to be applied to the order, it is equally applicable to the interpretation of it, and both are alike obligatory.

The acts of 1826 and 1831 were passed, avowedly, for the protection of securities on bond, note, or other contract. And even the latter of these statutes, under which this proceeding would fall, if either, (the party not having made special defence on the trial, and shown that he was security only, but coming forward, and obtaining control, after the payment of the execution,) only entitles the security to control the *fi. fa.*, for the purpose of remunerating himself out of the property of the principal.

Rogers, then, can invoke no relief from this quarter. The act of 1839, which provides a remedy for endorsers against all prior endorsers and the makers of promissory notes, and other contracts, is restricted, expressly, to notes, bonds, and other contracts, "*made in the face thereof, payable at any chartered bank, or which shall be negotiated at any chartered bank, or deposited there for collection*;" consequently, the note, which is the foundation of this *ca. sa.*, is excluded from its provisions. Even if this were a bank-note, the law applies only to persons who should become endorsers *after its passage*. It was approved December 21st, 1839, and the note bears date the 25th October, 1839; and as the endorsement of Berry Rogers is without date, it is presumed to be (and so charged in the declaration) cotemporaneous with the execution of the instrument.

As to the act of December, 1845, explanatory of the previous statutes of 1826 and 1831, it is sufficient to say, that it requires the party seeking the control of the judgment, to make it satisfactorily appear to the court that he was security only upon the original contract, which was the foundation of the judgment; and that, (the order under which this *ca. sa.* was issued was passed three years previously,) whether it be competent for the party, upon suitable notice, to avail himself of its provisions, we avoid expressing any opinion. Like its predecessors, of which it is amendatory, it seems, *ex vi termini*, to contemplate securities proper only. And, notwithstanding their manifest anxiety in this behalf, it would seem that it yet remains for the Legislature to provide a satisfactory remedy for endorsers against prior endorsers, upon other than bankable paper.

Let the judgment of the court below be reversed.

No. 68.—ELAM ALEXANDER, plaintiff in error, vs. HIRAM B. TROUTMAN, defendant in error.

In a suit upon a note payable upon time, *with interest from date, if not punctually paid*, the *back interest* is recoverable as stipulated damages.

If, in the entering up of the judgment, such *back interest* be not computed, the judgment may be afterwards amended, under an order of the court, so as to include the *interest from the date*; and the collection of it may be enforced, though the original execution had issued and been returned satisfied.

The defendant in error instituted suit in Bibb Superior Court, against the plaintiff in error, upon a note, of which the following is a copy: "\$1,800. On the 25th December next, I promise to pay H. B. Troutman, or bearer, eighteen hundred dollars for value received, *and if not punctually paid, interest from date*, Jan. 10th, 1842, Elam Alexander;" which note was credited with one hundred dollars.

At the trial term, judgment was confessed by counsel for the plaintiff in error for seventeen hundred dollars, with interest and costs of suit; and final judgment was thereupon entered up and signed for the principal, together with the interest computed from the maturity of the note, omitting the *back interest*. From this judgment, execution was issued and returned into court satisfied.

At May term, 1846, of the court below, Judge Floyd presiding, Messrs. Poe and Nisbet, counsel for the defendant in error, moved to open and amend the judgment by computing and including therein the *back interest*, which had been omitted in the original judgment. STUBBS, of counsel for the plaintiff in error, objected, which was overruled by the court below, and the counsel for the defendant in error were permitted by the court to amend the said original judgment. To which the counsel for the plaintiff in error excepted upon several grounds, the substance of which is stated in the opinion delivered by the Supreme Court, to which the reader is referred.

T. P. STUBBS, for the plaintiff in error.

A bill single, payable at a future day, with interest from date, if not punctually paid, the interest from date to maturity is a *penalty*, and not recoverable.—*Dinsmore vs. Hand*, 1 Ala. Rep. 126, decided in 1823.

A note payable at a future day, with interest from date, if not punctually paid, carries interest only from its *maturity*.—*Fugua and Hewitt vs. Carriel and Martin*, 1 Ala. Rep. 123, 170. This case is precisely parallel with the one now before the court.

After judgment was entered up for principal, and interest from maturity, at a subsequent term, the plaintiff's counsel moved to open the judgment, and count the *back interest*, which the circuit judge, as in this case, permitted. The Supreme Court corrected the error, and held that the *back interest* was a *penalty*, and could not be collected.

In a bond or note to pay a certain sum at a future day, with interest from date, at 5 per cent. a month, if not punctually paid, the contract for interest from date is a *penalty*. Only interest from maturity is recoverable.

A mortgage is made with interest at £5 per cent.; provided, that if the interest is not paid two months after due, then to pay £5 10s.—this is in the nature of

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a penalty, and the court will relieve against it; otherwise, if £5 10s. be reserved originally; and to be lessened to £5 per cent., if duly paid in two months after due.—*Strode vs. Parker*, 2 *Vernon*, and cases there cited; 2 *Vernon*, 289; 3 *Atk.* 519; 3 *Burrow*, 1374; 3 *Blk. Com.* 432; *Prec. in Chancery*, 160; 1 *P. Wms.* 652.

The plaintiff lent the defendant money on mortgage at £5 per cent. interest, but if not punctually paid, then to answer interest at £6 per cent. per annum. There being a great arrear of interest, the question was, whether it should be computed after the rate of £5 or £6 per cent.; decreed, the defendant pay but £5 per cent., and the court looked upon the reservation of £6 per cent. but as a nominal *pena* to oblige the defendant to more punctual payment.—*Holles vs. Wyse*, 2 *Vernon*, 289. Overruling a *dictum* in Lord Halifax's case, and the decision then made, adhered to in England uninterruptedly.

A mortgage with interest at 5 per cent., and a condition to take 4, if regularly paid, or at 4 per cent. with a condition to take 5, if not regularly paid. At law you might recover the 5 per cent. for it is the legal interest. But equity regards the 5 per cent. as a penalty, for securing the 4. Equity relieved against a penalty, long before a court of law.—*Seton vs. Slade*, and *Hunter vs. Seton*, 7 *Ves.* 274.

Where interest reserved was 4 per cent., a subsequent condition for 5 per cent. if the payment was not regular, would plainly be a penalty; but where the reservation was at 5 per cent., an agreement by a subsequent clause, to accept 4, if that was regularly offered would hardly give the character of a penalty to the first stipulation. There seems to be a material difference between an original agreement and a superadded condition.—See note to *Seton vs. Slade*, 7 *Ves. Jr.* 279.

The true foundation of the relief in this and all such cases is, that as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that justice requires.

And, notwithstanding the objections which have been urged against it, it seems a sufficient foundation. In reason, in conscience, and natural equity, there is no ground to say that, because a man has stipulated for a penalty, in case of his omission to do a particular act, (the real object of the parties being the performance of the act,) if he omits to do the act, he shall suffer an enormous and wholly disproportioned to the injury.

If it be said, it is his own folly to have made such a stipulation, it may equally well be said, that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy the name, if it did not provide means, to some extent, of preventing the mischief of improvidence, rashness and credulity on one side, and of skill, avarice, and gross violation of the principles of morals and conscience on the other.

Where a penalty or forfeiture is designed, merely as a security to enforce the principal obligation, it is as much against conscience to allow a party to pervert it to a different and oppressive purpose, as it would be to substitute it for the principal obligation.—*Story's Eq. Jur.* 547, 548, and note; *Newland on Con.* chap. 17. § 307 to 311.

Courts of common law have concurrent jurisdiction in relieving against penalties, where compensation can be made.—See leading case, *Auley vs. Francis Wenden*, 2 *Bos. and Pul.* 346. The jurisdiction of courts of equity, in relieving against penalties, is of very high antiquity.

The Legislature has now adopted this practice, (says *Chambre, J.*) and affords the same benefits to defendants in actions at law; and it has lately been settled, that it is not matter of election to proceed under the statute, but that the directions are compulsory and must be pursued.

The same learned judge in the same case says: There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger. The statute 8 and 9 *Wm. 3.* ch. 11, sec. 8, is a remedial statute passed for the benefit of defendants, and has been construed to extend to actions on any penal sum for non-performance of contracts, non-payment of money, &c.—See *Roles vs. Rosewell*, 5 *Term Rep.* 535, 536.

Lord Mansfield said: It is surprising that after the statute of usury, (37 *Edw. 3.*)

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which excepts obligations, with condition made upon just and true intent, the courts of law did not consider the just intent of a bond to be principal, interest and costs secured by a penalty, and suffer the party at any time to save the forfeiture by performing the intent. It is more extraordinary that, after this was settled in a court of equity to be the nature of a bond, and therefore every party to a bond understood it in this sense, the courts of law did not follow equity, but still continued to do injustice as of course, and put the parties to the delay and expense of setting it right elsewhere as of course.

The act of Parliament meant, that, in case of penalties by way of security, the clear, final justice of the case, should be obtained in courts of law, much to the benefit of both parties.

This act of Parliament (says Lord Mansfield) reforms, in some instances, an erroneous course of proceedings in the courts of law and equity, which ought never to have prevailed, and which the courts themselves might and ought to have remedied, but did not. Therefore it should not only have the most liberal construction, but the courts ought to exercise their own authority to extend the spirit and reason of the act, for the speedier, easier and better advancement of justice to cases not mentioned in the act.—*Bonafous vs. Rybot*, 3 *Burrows*, 1373-4.

The Supreme Court of Alabama, in delivering the opinion of the court in a case precisely like the present, where the back interest was sought, said: "We cannot suppose it necessary, at this day, to offer argument or authority to prove, that that which in its nature and character, and according to settled legal principles, is a penalty, must not be so considered, because it is *called interest* in the note. It is immaterial by what name the parties call it—the settled principles for the construction of contracts must determine its true character.—*Sumston vs. Thomson*, 1 *Ala. Rep.* 233.

A penalty is an agreement to pay a greater sum, to secure the payment of a less sum. It is a condition, and can be avoided by the payment of the less sum, before the contingency agreed upon shall happen. It is immaterial by what name it is called. If it accrues in a gross amount on the maturity of the note, it is a penalty, and not interest. The nature of interest is absolute, and unconditional, to run on a debt due, and withheld.—*Winston vs. Thompson*, 1 *Ala. R.* 227, decided in 1824.

In a case like the present, where the bill was payable 365 days after sight, and a bond and security given for the prompt payment, with the condition that the obligors in the bond would, if the bill was returned protested, pay the principal thereof, together with interest thereupon of £5 per cent. from the date of such bill till paid. Lord Loughborough, who delivered the opinion of the court, said: "I do not go on the denomination given by the instrument, for whatever that may be, in this case, that could not by possibility have been an agreement for liquidated damages, which can only be where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties, or to guard against the performance of acts which, if done, would also be injurious.—*Orr vs. Churchill*, 1 *H. Blackstone*, 227, cited in 2 *Comyn on Con.* 547.

C. J. McDONALD, representing Messrs. POE and NISBET, for the defendant in error.

By the Court—NISBET, Judge.

The several assignments of error in this cause, resolve themselves into one question, and that is, is the agreement upon the face of this paper to pay interest from date, if the principal sum is not punctually paid at its maturity, in the nature of a penalty? or is it an undertaking to pay the back interest as damages? The court below decided it to be an undertaking to pay the back interest as damages, for a failure to pay the principal sum at the maturity of the note. Upon this decision, the plaintiff in error brings this cause up. If this back interest is stipulated damages, then the plaintiff below was entitled to recover it,—if a penalty, he

entitled under the contract to recover whatever, in the proper form of action, he could prove to be the quantum of his injury. The parties do not call it either the one or the other—if they did, the name they gave to it would not change its nature. That is settled by the authorities.—*Story's Eq.*, sec. 1318. The amount in this case is liquidated, whether it be penalty or damage; for the agreement is, in case of non-payment punctually, then to pay "interest from date"—that is, the interest which the law allows, to be computed from the date of the note.

By referring to the note, and to the law of the State, prescribing the rate of interest, the amount will be ascertained, *id certum est quod certum reddi potest*. One thing is very clear—that is, that neither the courts of Great Britain, nor of our Union, have established any rule, by which it can always with certainty be determined, what is a penalty, and what liquidated damages. We shall, of course, undertake to establish none. It is settled by the later cases, that, in order to ascertain whether the sum specified in the agreement is to be considered a penalty or liquidated damages, the court must look to the whole of the agreement, and unless it clearly appear thereby to have been intended by the parties as liquidated damages, it will be considered as a penalty only.—*Tidd's Practice*, 877; 6 *Barn. and Cres.* 216; 11 *Mass. Rep.* 81. In commenting on this subject, Mr. Justice Story remarks: "But we are carefully to distinguish between cases of penalties strictly so called, and cases of liquidated damages. The latter properly occur, where the parties have agreed, that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum, as the just, appropriate, and conventional amount of the damages sustained by such act or omission. In cases of this sort, courts of equity will not interfere to grant relief, but deem the parties entitled to fix their own measure of damages, provided always, that the damages do not assume the character of gross extravagance, or of wanton or unreasonable disproportion to the nature or extent of the injury."—*Story's Eq. Juris.* sec. 1318; *Eden on Injunctions*, 41.

Upon a careful review of the authorities, we are prepared to say, that this extract affords the best general rule upon a question of no little complexity. We do not see why its application may not in most cases determine what is a penalty, and what damage. Its application relieves us from doubt as to what is the law of the case before us. It is a safe general rule, not to interfere with the contract which parties have thought proper to make; it is the business of courts of justice, not to make, but to enforce contracts. If the meaning of the parties is reasonably plain, the courts will not be astute to find out a different meaning. The parties in this case, and in all others of like character, have the unquestionable right to fix their own measure of damages. They are presumed to know, better than a jury could determine for them, what injury would result from any given act or omission. And if the parties have made their contract, and it is not in contravention of the law, let it even be conceded to be unreasonable; it is right to compel them to abide it. In *Lowe vs. Peers*, (*Burrow*, 2229,) Lord Mansfield sustains these general views in these words: "When the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damages, and the jury is confined to it." In that case Peers had in writing bound himself to marry Mrs. Lowe, and in default, to pay her 1000 pounds. This was held to be a

case of damages. A reason for abiding the damages which the parties have agreed upon, is found in the difficulty which a jury would find, in many cases, of ascertaining the amount of injury sustained.—6 *Bing*. 141. In the case we are now determining, we know of but one criterion which the jury would have, by which to fix the damages which the payee sustained, and that is the very one by which the parties themselves ascertained them, to wit, the legal rate of interest on the money. How unnecessary in such a case to go to a jury, simply to affirm the contract of the parties.

So one, in consideration of one dollar, agreed by deed not to run a stage on a specified road, under a penalty of \$290. The penalty named was ruled damages.—8 *Mass*. 222.

So a creditor grants indulgence for two years, and covenants that he will not sue, under penalty of a forfeiture of the debt. Held to be damages.—4 *Mass*. 433.

The reader is referred to the following cases, determined to be damages.—*Ponsonby vs. Adams*, 9 *Bro. P. C.* 417; *Roy vs. Duke of Beaufort*, 2 *Atk.* 199; *Love vs. Peers*, 4 *Burrow's Rep.* 2229; *Fletcher vs. Dyche*, 2 *T. R.* 52; *Barton vs. Glover*, 1 *Holt*. 43; *Christie vs. Bolton*, 3 *B. & C.* 280; 3 *Taunton*, 469; 3 *B. & H.* 692; 8 *Moore*, 244; 1 *Bing*. 302.

On the other hand, it may be considered as settled, that where a larger sum is stipulated to be paid, in order to secure the prompt payment of a lesser, it is a case of penalty.—2 *Bos. & Pul.* 346. So, too, where a specified sum is agreed upon, to cover different breaches, and would be in some cases too large, and in others too small, that is a case of penalty.—6 *Barn. & Cres.* 216.

In all cases where the damages are excessive, they are held to be penalty.—*Story's Eq. sec.* 1318. Such was the case read from Alabama, determined by the Supreme Court of that State. There the back interest reserved, ranged from two and a half to ten per cent. per month. As to what are cases of penalty, see 1 *Bro. C. C.* 418; 1 *Cox*, 26; 2 *Bos. & Pul.* 346; 3 *B. & P.* 630; 13 *East*, 348; 1 *Camp.* 78; 3 *Burrow*, 1374; 1 *H. Black.* 227; 2 *Vernon*, 315; 1 *Ala. Rep.* 170; 1 *ib.* 170; 1 *ib.* 209; 11 *Mass.* 76. Scarcely any two cases upon this subject are to be found alike, illustrating the difficulty of determining the case before us, upon authority. Believing this to be impossible, we shall decide it upon the general principles laid down by Mr. Story, and to them we again revert, premising that this is not a case where a small sum is secured by a larger, nor a case where one penalty is made to cover different breaches of various importance.

According to Story, cases of liquidated damages occur, when the parties have agreed, that in case one party shall do, or omit to do, a stipulated act, the other shall receive a certain sum. Now, it is upon this note agreed, that if the maker shall omit to pay the principal of the debt at its maturity, the other party, to wit, the payee, shall receive interest upon that sum from its date; that is, the interest fixed by law for a given period upon a given sum. The sum is therefore agreed to be paid, and it is a certain sum; and it is to be paid if the maker omit to do a stipulated act.

Further, this sum is to be paid as a *just, appropriate and conventional* amount of the damages sustained by the omission. This back interest is the *conventional* amount of the damages, because it is the amount agreed upon between the parties. It is *appropriate* in this, that it is the rate of interest which the law itself has ascertained as the value of money. And its *justness* will appear from the following considerations: One taking a note upon time, is reasonably presumed to make his monetary arrangements upon the faith of prompt payment, and if he is not promptly paid, it is a fair presumption that his own affairs are thereby deranged, and he himself damnified. The amount of that injury will be different, of course, according to the circumstances of each case; but we can reason only according to the operation of general rules. We suppose, then, that if his debt is promptly paid, the advantage to him will be equal to the legal interest on the amount, for the time his debtor has had the use of his money, or its equivalent in property. If not promptly paid, the corresponding injury will be equal to the interest for the time. The benefits of these contracts upon time, contrary to the received opinion, according to the legal view of them, are reciprocal. When A sells property, or lends his money to B, and takes his note at twelve months, the possession of the property or the money passing at the time to B, the legal inference is, that the price of the property or of the money is enhanced by the interest on the cash price of the property, or the actual sum loaned, for twelve months. This interest is added in the note. Now, if there be a stipulation, that in case of non-payment at maturity, the note shall bear interest from date, and it is not paid, and the back interest is collected, the common opinion is, that A in the above case realizes sixteen per cent. upon this contract, to wit, eight per cent. originally added into the note, in consideration of time, and eight per cent. of the back interest. But is this true? It is true that he does, in fact, receive sixteen per cent., but eight per cent. of that interest is offsetted by the use of the property, or the money in the hands of B; the use being worth eight per cent. to him. The consequence is, that, in cases where the damages thus stipulated to be paid do not exceed eight per cent., the payee realized only eight per cent. upon his money, or the price of his property. Then the result is such a contract as the one before us enforced, is, that the payee gets eight per cent., the lawful interest upon money. Now, is such amount otherwise than just? We think not. And if just, it is not grossly *extraneous* or *wanton*, or *unreasonably disproportioned* to the injury.

We know that, in point of fact, the giving of time does often enhance the price of property or money, far beyond eight cent., as stated. But how can we judicially know that to be the case here? We reason from the record. The reasonableness and justness of the damages in this case might be variously illustrated. We refer only to the instance of administrators, whose notes are taken at twelve months, and very often with the condition found in this note. It is of serious importance to the estate which he represents, that the debts thus contracted be promptly paid. At the expiration of twelve months, he is liable, not only to be called upon, but to be sued, if the estate which he represents, which is very generally the case, has no resources to pay debts, but the proceeds of the sale; and the debts contracted on account of the sale are not promptly met; then he

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is put to great inconvenience, and the estate of his intestate injured. He is compelled, perhaps, to borrow money, at exorbitant rates; to submit to be sued and pay costs, or to sue upon the notes in his hands, and pay commissions for collecting. In his case, eight per cent. for twelve months cannot be considered unjust or excessive damages.

We affirm the judgment of the court below.

No. 69.—JOHN D. STELL, Guardian, &c., plaintiff in error, vs. ELIJAH GLASS, in right of his wife, &c., defendant in error.

Where one only of three defendants enters an appeal under the act of 1839, and one of the other two dies, between the first and second trial, he was a party to the appeal, so far as to require his legal representative to be made a party to the cause before it can proceed.

Parol evidence is inadmissible to vary or add to a record. It may be introduced to rebut the charge that the order of the Court of Ordinary was fraudulently procured.

In a bill filed by a ward to recover the trust fund out of the hands of a former guardian, he will be allowed to prove the payment of debts contracted on account of his ward *before*, but not discharged until after, his dismission; and that, too, without first having the vouchers for these disbursements, allowed by the Court of Ordinary.

The Court of Ordinary having jurisdiction over the question, as to whether a guardian shall vest a portion of his ward's funds in the purchase of land, to be cultivated by the slaves of the minor, their order authorizing it to be done, will be presumed to have been granted upon sufficient evidence as to the expediency of the transaction, and cannot be invalidated in any other court, unless impeached for fraud.

It is error in the court, and a new trial will be granted for mis-direction, if the style of the charge is such as to mislead the jury in mistaking it for direction in point of law, instead of the mere expression of the opinion of the court upon the facts.

For the facts of the case, and the grounds of error, see the opinion of the Supreme Court. His Honor Judge WARNER, having been of counsel in the court below in this cause, gave no opinion upon it in the Supreme Court.

Θ. WARNER, for the plaintiff in error.

1st. The first error assigned is, that the court below decided that the legal representative of Samuel Thompson, deceased, need not to be made a party to the cause on the appeal, he in his lifetime having failed to appeal, and having died after the appeal was entered.

Previous to the act of 1839, all the defendants or plaintiffs in a cause were required to enter an appeal. By that act, any one of two or more plaintiffs or defendants are allowed to appeal, where the others refuse or fail to do so.—*Hotch. Dig.* 601.

The same statute also provides, "that the whole record shall be taken up; but in case damages shall be awarded on such appeal, such damages shall only be recovered against the party appealing and his securities."

Before the act of 1839, it is believed that it would have been necessary to have made the representative of Thompson a party. The whole record, by the act of 1839, is required to be taken up. That record must be the entire record. A party in the cause is an important part of the record; consequently that party must go

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up, otherwise the record would be imperfect. Samuel Thompson appears as a party defendant in the cause on the appeal. His answer to the charges in the bill being a part of the record, is before the court on the appeal. The rights and interests of S. Thompson may be affected by the final decree.

It is a rule in equity causes, that all persons interested in the subject matter of the suit should be made parties. In many cases, it would be impossible for the court, in an equity cause on the appeal, to make a suitable decree unless all the parties were really and substantially before it. Suppose two joint plaintiffs in an action at law are sought, by bill in chancery, to be perpetually enjoined. Upon the first trial, a decree of perpetual injunction is had. One of the defendants in the bill appeals from that decree, the other defendant refuses to do so. Upon the appeal, the court, upon the merits of the cause, refuses the perpetual injunction as to the party appellant. In such a case, what would become of the joint action at law. By the first decree, one joint plaintiff is perpetually enjoined from prosecuting his action. By the decree on the appeal, the other joint plaintiff is permitted to proceed. But the action at law being in its nature joint, how could it be prosecuted?

Many other cases might be put of similar character, going to show that it would be impossible to make a decree on the appeal, without all the parties being before the court.

What is the proper construction of the act of 1839? Before the passage of the act, it was in the power of one of several plaintiffs or defendants to prevent an appeal, by his failing or refusing to join in entering it. That act was passed to remedy this mischief—one defendant or plaintiff has no longer that power.

We have seen that the same act provides that the whole record, that is, the whole cause, including the parties, shall go up. Now, we say, that a sound and proper construction of the act of 1839 does not take away the right of the court to make a decree or pronounce a judgment on the appeal, which will affect the rights of the party not appealing, so far as those rights and interests are involved in the record before the court; that the party not appealing is as much bound by the final judgment on the appeal, and that such judgment can be as fully enforced against him, and to the same extent, as against the party who does appeal, with the exception of damages awarded for frivolous appeal. There is nothing in the act which prohibits the court from pronouncing such a judgment as was made in cases on the appeal before the act. Judgment goes against all the parties on the appeal, except as to damages, where it is necessary, from the proofs in the case such a judgment or decree should be given. Any other construction will put in the power of a party to defeat not only the ends of justice, but effectually stop the regular course of legal proceedings.

2d. The second ground of error assigned is, that the court below rejected parol testimony, offered by counsel for plaintiff in error, relative to the order of the Court of Ordinary of Fayette county, passed at its March term, 1840, authorizing Stell, the guardian, to purchase a tract of land for the benefit of his ward.

The objection urged against the admissibility of this evidence is, that it contradicts the record. But we say, such is not the object or effect of the testimony. It will be perceived that the order does not specify what tract of land the guardian should purchase of Thompson, the extent of the tract, or quantity of estate therein. Hence parol evidence was not only admissible to identify the tract of land, bought by the guardian, as being the one referred to in the order, but necessary for that purpose, and to give effect to the subject matter of the order.

Extrinsic parol evidence is admissible generally to give effect to a written instrument, by applying it to its proper subject matter.—3 *Stark on Ev.* 1021 and 1026; *Doe ex dem. Freeland vs. Burt*, 1 *Term Rep.* 701; *Barkley vs. Barkley*, 3 *McCord Rep.* 269. Parol evidence is inadmissible to prove that money, granted by a parish, was for a different purpose than that expressed in the record.—*Beane vs. Snow*, 1 *Mass.* 181.

3d. As to the third ground of error. The defendants in error filed their bill against Stell, the former guardian, to account and to pay over what he was indebted

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to them. The question at issue in the pleadings was, what amount was the guardian indebted to his ward?

The court of equity has peculiar, though not exclusive, jurisdiction in matters of account.

The fact that Stell had been dismissed, upon his application, from the guardianship, is not material. The dismissal is not conclusive, that he has been paid, nor, as to the mutual indebtedness between the guardian and ward; if so, the ward is as much concluded as the guardian. The Court of Equity has full and complete jurisdiction of a trust of this character. The court had full power to judge of the correctness and propriety of these accounts of the guardian. The persons to whom the accounts were paid, were competent witnesses to prove the payment. It was contrary to the first principles of equity, to withhold from the guardian credit for money, which was his duty to advance for the necessary education and maintenance of his ward.

A trustee acting in good faith, is entitled to a prompt indemnity for his necessary disbursements and expenses, and has a lien on the trust property for them.—*Murray vs. De Rotterdam*, 6 John. Ch. R. 52.

4th. The fourth ground of error assigned is, the refusal of the court below to charge the jury, at the request of counsel for plaintiff in error, that the Court of Ordinary of Fayette, had the jurisdiction and the right to pay the order made at its March term, 1840, authorizing Stell, the guardian, to purchase a tract of land of Samuel Thompson, for the benefit of his ward; and that the guardian had the right to make the purchase under it which he did make, unless the same was procured by fraud on the part of the guardian. But the court instead thereof, charged the jury that the state of things, contemplated by the statute under which the order was passed, did not exist, and that the guardian had not the right to apply for, nor the court to grant the order, and that the purchase under it, by the guardian, was a legal fraud, and the sale must be set aside, and the guardian required to account for the money invested in said purchase, with interest.

The first question that presents itself upon this ground of error is, had the Court of Ordinary jurisdiction, and the right, under the circumstances, to pass the order made at the March term, 1840?

It is conceded that the Court of Ordinary, in this respect, is a court of limited jurisdiction, and derives its power by statute. The power to grant the order, is derived from the act of the 19th Dec. 1829.

This statute authorizes the guardian, under an order of the Court of Ordinary, when the ward is not possessed of lands, to apply such portion of the disposable funds of the ward, to the purchase of such reasonable portion of land as may be necessary for the purposes of the act, (that is, for agricultural purposes,) when it is manifestly expedient to do so.—*Hotch. Dig.* 335.

The guardian cannot take this step without an order for that purpose. The right to grant the order is conferred by the statute on the court. The court has, unquestionably, jurisdiction of the subject matter of the order, i. e. to authorize the guardian to purchase land for his ward. It is true, the statute states the circumstances under which it may be done, but who is to determine whether such circumstances exist? What tribunal is required to act upon and decide as to their existence? Most clearly, the Court of Ordinary. That court is called upon to determine, when an application is made for its order, whether there is, in the particular case upon which the application is predicated, such facts and circumstances as will authorize the granting of the order. The court having exclusive original jurisdiction of the subject, is called upon to exercise a sound judicial discretion, in determining whether the application shall be granted or not.

The jurisdiction of a court can never depend upon a proper or improper exercise of discretionary power. What may be manifestly expedient for the interest of the ward, under a given set of circumstances, is matter of opinion.

What one would deem expedient, another might consider inexpedient. The jurisdiction of a court can never depend upon what may be the basis of a thousand conflicting opinions. It must be necessarily presumed, that when the court

passed its order, it had sufficient evidence before it, to authorize the granting of such order. By the act of 21st Dec. 1827, the Courts of Ordinary are authorized to grant an order to sell the real estate of orphans, "where it is made fully and plainly to appear that the same will be for the benefit of such orphans."—*Hold. Dig.* 482.

Suppose the court grants an order to sell under this last statute, and the guardian sell the land, and the purchaser takes possession; upon the ward's arriving at age, would any court hold, that he could recover the land sold, upon the ground the sale was illegal, for want of jurisdiction by the court that granted the order because it might be made to appear by competent evidence, that it was plainly and fully against the interest of the ward that the land should be sold? We say, then that the Court of Ordinary had jurisdiction, and the right to pass the order in March term, 1840.

The next question is, had the court below the right to impeach, or set aside the order, and consequently, to set aside the purchase of the guardian under it?

We contend that the order was the judgment of a court of competent jurisdiction, and was conclusive, until reversed for error by a tribunal having the power to reverse it; and that the purchase under the order was valid, unless the same were procured by fraud on the part of the guardian.

One court will not look into the proceedings of another, having jurisdiction, in order to ascertain in what manner they acted.—*Hall vs. Carruthers*, 1 *McC.* Rep. 507.

However extraordinary or erroneous be the determination and proceedings of a court of limited authority, if it acts in its proper jurisdiction as to the subject matter, place, or person, its judgment or decree cannot be impeached or invalidated in a collateral action.—*Jackson ex dem. Jenkins vs. Robinson*, 4 *Wend.* 436.

An order or decree of the Orphan's Court of the State of Alabama, in a case within its jurisdiction, like judgments, or decrees in the ordinary course of justice, would not be void, or collaterally impeachable, though the proceedings may discover errors, for which an appellate court, if directly appealed to, should reverse.—*Wyman et al. vs. Campbell et al.* 6 *Porter*, 220.

Again, it was held in *Richardson vs. Hobart*, 1 *Stewart's Rep.* 500, that an order of sale made by a county court of Alabama, was its judgment, and that judgment could not be impeached incidentally, when introduced as a piece of evidence.

It is not pretended that there was any actual fraud or collusion by the guardian either in obtaining the order, or in making the purchase under it.

The guardian derived no benefit from the purchase. The testimony shows he acted in good faith throughout the whole transaction. He was actuated by the kindest, purest motives, in all he did. The court below, however, charged the jury, "that though nothing wrong might have been intended, yet, under the circumstances of the case, the purchase was a legal fraud upon the rights of the ward."

By the term legal fraud, or fraud in law, is meant, it is supposed, what is called constructive fraud, "which may be created by such acts or contracts, as, though not originating in any actual evil design, or contrivance to perpetrate a positive fraud, or injury upon other persons, are yet, by their tendency to deceive, or mislead others, or to violate public or private confidence, or to impair or injure public interests, prohibited by law."—1 *Story Com. on Eq.* 261. Under this head, may be classed all contracts made in restraint of marriage, bargains made in restraint of trade, contracts between clients and attorneys, trustees, and *cestui que trust*, and contracts of a similar character.

In many of these cases, such contracts, from considerations of public policy, are held to be void in law.

In the case at bar, these principles cannot apply; yet the purchase made by the guardian, under the peculiar circumstances of the case, was properly made. It was not in violation of public policy, nor of the real interests of the ward, though her pecuniary interest alone has not been, perhaps, as fully promoted, as if the money had been kept at interest. Yet, when it is considered that the ward or

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rived her property by gift from her father, J. Thompson, one of the defendants, who at the time the purchase was made, was, and is yet, in life; and that the property given to his daughter, the ward, embraced his whole estate; the propriety of the ward's residing with her parents, and of their having a home where they might take their child under their charge to protect, and watch over her, during the years of her minority; the purchase cannot be deemed inexpedient, or so utterly derogatory to the interests of the ward—especially, in a moral and social point of view—as to create a fraud in law. And it is hoped that the time will never come, when our tribunals, authorized to superintend the management of wards and their estates, will have nothing further in view, in the exercise of their powers, than the mere pecuniary interests of those, thus entrusted to their charge.

T. A. LATHAM and Wm. EZZARD, for the defendant in error.

Mr. LATHAM argued, that Samuel and Jeremiah Thompson were unnecessary parties: Stell was liable to his ward for the amount of assets in his hands. The point at issue between Stell and his ward was, as to the amount of assets then in the hands of Stell, unaccounted for. The Thompsons were not interested in that question; one of them was former guardian, but not charged of having any assets in his hands; the other conveyed the land to Stell, as guardian, and having no interest in the question of account made by the bill, they are not legal parties; for it is interest, immediate or consequential, that makes the necessary parties.—*Murford Pl. 220*; 1 *Daniel Chan. Prac. 200*. Jeremiah Thompson was made a party to show that the assets had come regularly down to the hands of Stell; Samuel Thompson, to show that Stell had applied those assets contrary to law, and in violation of his trust. No decree was sought against them, and none could be rendered by the strict rules of equity, for the only question was between Stell and his ward, as to the amount of assets. There was no attempt to reach the assets wrongfully paid for the land in the hands of Samuel Thompson; no charge that Stell was unable to respond; and the Thompsons could not be made liable for assets sought to be recovered from Stell, and for which Stell was primarily liable.

In this case, a perfect decree can be made between the surviving parties upon the subject of litigation, and therefore, a reviver is not necessary.—*Leggett vs. Dubois, 2 Paige, 211*; 3 *B. & H. Eq. Dig. 147*; *Hoffman Ch. P. 375*. The verdict and decree is according to the case made by the bill. The prayer is immaterial, for it is not absolutely necessary that there should be any special relief inserted.—12 *Ves. 48*; 2 *ib. 395*; *Story's Eq. Pl. 41*.

But Stell alone appealed under the act.—*Hotchkiss, 601*; *Laws of 1839, Pamphlet, 143*.

It was under this act, no doubt, that the court below decided that the case need not be revived as to the representatives of Samuel Thompson. Suppose he had been alive, would he have been a party to the issue? Could he have amended his answer?—continued the case?—or have done any other act that a party could do? His day in court was gone. We maintain that a party who has not appealed, has none of the rights of a party in the case; the litigation and the rights consequent upon it are closed as to him. The appeal brings up the case, as between the appellant and the appellee, and as between no other persons. The representatives of Thompson have no more rights than he had, and are bound by what he was. If Thompson could not defend, if living, not being a party to the appeal, his representatives could not after his death. The law gives the representative who is made a party many rights, but they are all limited by the rights that the testator himself had.—*Toller, 431*; 12 *Ves. 315*; 1 *Johns. Ch. Rep. 349, 432*; 2 *ib. 247*; 3 *Burrow's R. 1738*; 2 *Tidd, 1198*.

2d. What passed at the time, and was understood by the court, was the order. The order is an authority, and cannot be enlarged by r

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ject was to prove that an order, general on its face, was subject to restrictions and stipulations not appearing on its face.—1 *Johns. Rep.* 417, 466; *Chitty on Contracts*, 25; 1 *Johns. Rep.* 231, 339. But this order is in the nature of a record, which is a verity—is to speak for itself, and cannot be gainsayed.—*Fonblanque*, 641.

3d. The accounts of Stell had been made up, returned to the Court of Ordinary, and passed upon and allowed, and letters of dismission granted. It was his duty to make a return of all his disbursements, and have them allowed by the proper tribunal, and his letters dismissory are an estoppel against his now setting them up.—*Prince Dig.* 232, 240; *Hotchkiss*, 337, 477.

4th and 5th grounds. There was no error in the charge of the court as to the construction of the act of 1829. The preamble shows the intention of the Legislature; the 1st and 2d sections, and the first clause of the 3d section, do not touch this case. The last clause provides, that when minors may not be possessed of lands for cultivation, their guardians may apply such portion of their disposable funds, as may be properly applied to that purpose, to the purchase of such reasonable portion of land as may be necessary for the purpose of the act; or they may rent land for the same purposes, under a like order of the court. Now the facts: the ward was a young lady, 14 years of age; her property was one negro man whose hire was of the annual value of \$75 00, and one negro woman and child, whose annual hire was worth \$25 00, and about \$800 00 in money. This was all her estate! And, before the order in question was made, another had been passed to let her father keep, and have the services of, her negroes for her board, while she was going to school. The purchase of the land left her without a dollar! The disposition before made by her negroes, left her without the means of cultivating the land thus purchased! It was a waste; and the act of 1829, and the order of the Court of Ordinary, cannot justify the guardian. It is not a case within the principles of the act. The ward had no disposable funds. She had no sufficient farming force to justify any reasonable expectation that a farm could be conducted in her behalf, so as to benefit her. Her permanent interest, instead of being promoted, it was obvious, must suffer. The order was procured at the instance of Stell, and its execution was left to his discretion. He was not bound to execute it, and he is responsible. As a trustee, he is bound by the laws and rules that govern trusts.—*Hotchkiss*, 335; *Hovenden on Frauds*, §§ 1 *Johns. Ch. Rep.* 477; *Green vs. Winter*, 39; 2 *Johns. Ch. Rep.* 62; *Hart vs. Ten Eyck*, 109, 114; 2 *Story*, 514; 16 *Ves. (Holland vs. Hughes)* 114-16; *Idem (Uses)*, 10.

When special directions are given by the instrument creating the trust, or special duties imposed on the trustee, he must follow out the objects and intentions of the parties faithfully, and be vigilant in the discharge of his duties, to be strictly acted on and executed.—2 *Story*, 517.

The act of the trustee shall not injure the *cestui que trust*.—*Roy, Exr. vs. McCollough, Cam and Nor.* 492; 2 *B. and H. Eq. Dig.* 496; 2 *John. Ch. Rep.* 442, 491; 1 *Hill Ch. Rep.* 409.

Mr. EZZARD, on the same side.

The 1st ground of error assigned, that the court erred in deciding that the representative of Samuel Thompson, deceased, need not be made a party, &c.

It is contended by defendant in error, that, inasmuch as Thompson did not appear, no verdict could be rendered on the appeal trial which would be prejudicial to his interest, or to the interest of his estate—his rights and the extent of his liability being fixed by the first verdict; and that, therefore, he could have no interest in the trial on the appeal, and consequently there was no necessity for making him a representative a party.—*Hotchkiss*, 601; *Story Eq. Ple.* 268; 3 *Barbour and He Eq. Dig.* 147; 2 *Paige, Rep.* 211; *Hoffman, Chan. Prac.* 375; *Misford Ple.* 94 2d ground. As to the rejection of parol testimony offered to explain the record &c., we contend that parol evidence is inadmissible to contradict, vary or add to a written instrument; and much less can it be admitted to vary an order of court.

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which is a matter of record, and must speak for itself, and more especially where there is no ambiguity. A contract cannot rest partly in writing and partly in parol; and certainly an order of court, which is a matter of record, cannot.—3 *Starkie on Ev.* 100–101; *Chitty on Con.* 87; 1 *Johns. Rep.* 417, 466; 1 *Johns. Ch. Rep.* 231; *Fonblanque's Eq.* 641; *Greenleaf's Ev.* 315.

3d ground. As to rejection of testimony to prove accounts paid by the guardian, which had not been returned to the Court of Ordinary. There was no error in this, because the Court of Ordinary has original jurisdiction of such accounts, which must be passed on by that court in the first instance. The law makes it the duty of guardians to make annual returns of receipts and disbursements to said court, and the presumption is, that they have been submitted and rejected by that court; or, that he retained a sufficient sum in his hands to discharge said debts, on obtaining letters dismissory, and, if rejected by the Court of Ordinary, they could not be allowed by the Superior Court, when brought before it on an appeal; and, if allowed in his settlement with the Court of Ordinary on obtaining letters of dismission, they ought not to be allowed again; and if he had contracted debts for his ward, which he had not paid, it was his own folly to apply for letters of dismission, until he had paid them.—*Constitution of Georgia*, art. 3 sec. 6; *Prince Dig.* 232, 238, 242, 249; *Hotchkiss*, 337.

The 4th and 5th grounds relate to errors alleged to exist in the charge of the court to the jury. Whether the charge was erroneous or not, must depend upon the construction to be given to the statute of 1829.—*Prince Dig.* 253. This statute provides that, when it may be manifestly expedient, guardians may cause plantations to be cultivated for the benefit of their wards; and when minors may not be possessed of lands for cultivation, guardians may apply such of their disposable funds as may properly be applied for that purpose to the purchase of such reasonable portion of land as may be necessary for the purposes of said act; clearly indicating that the guardian, in the exercise of this power, is to use a wise and prudent discretion, and that lands for this purpose can only be purchased when it shall appear to be manifestly for the interest of the ward: and then he is required to make annual returns of his receipts and disbursements under this act. So far from this being the case, the act of the guardian in this particular was, according to the evidence, wholly prejudicial to the interest of the ward: the whole of her funds having been invested in a tract of land which was used and cultivated by another for his own use, and from which the ward received nothing—the guardian never having returned that he had received one cent from the cultivation of said lot of land. In fact he did not pretend to cultivate it; for, as appears from his own answer, he had, previous to that time, procured the court to pass an order, by which he had placed the negroes of the ward in the possession of Jeremiah Thompson, for their board and clothing, and for the board of his ward, and had also secured to Thompson a life estate in one-half of the land, thereby depriving himself of the means of cultivating the same, and rendering it inexpedient and improper that he should have purchased land, provided he had bought it at a fair price.

His Honor Judge WARNER gave no opinion in this case, having been of counsel in the court below.

By the Court—LUMPKIN, Judge.

John D. Stell, it seems, was appointed guardian of Maria Louisa Thompson, at the March Term, 1838, of the Court of Ordinary, of Fayette county; and received several slaves, and between eight and nine hundred dollars in money, from Jeremiah Thompson, her former guardian and father. Two years thereafter he obtained an order from the su

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court, authorizing him to purchase a tract of land from one Samuel Thompson, the grandfather of his ward, and for her use and benefit. At the end of the year 1840, he made the purchase, taking a deed of conveyance to the land; reserving a life estate in one half thereof to Jeremiah Thompson. In March, 1841, Stell was dismissed from his guardianship, upon his own application. His ward having intermarried with Elijah Glass, a bill was filed by them against Stell and the two Thompsons; alleging, among other things, that the order for the purchase of the land was procured by a fraudulent combination between all three of the parties; and that the tract of land was bought and held for the use of the defendants, and not for the benefit of the minor. The bill prayed a general account and settlement. The defendants answered the bill, and at the March Term, 1844, the Superior Court of Fayette county, decreed generally for the complainants the sum of four hundred dollars, the costs to be equally divided between the parties, and that the land remain the property of the complainants.

From this decree John D. Stell alone appealed, and the cause was finally tried before Judge Hill, in March, 1846. Samuel Thompson having, in the mean time, departed this life; Stell, by his counsel, insisted that the legal representative of S. Thompson should be made a party; but the objection was overruled, and the cause ordered to proceed.

Stell offered, among other witnesses, William McBride, the clerk of the Court of Ordinary at the time the order was procured, to prove that he bought the identical land designated in the order, and upon the same terms as were understood and agreed upon between the court and himself. This testimony was repelled by the court. Stell then attempted to prove the amount and payment of sundry accounts, contracted for his ward before, but discharged after, his dismissal. This evidence was rejected.

The case having been submitted to the jury, the court charged: "that the state of things contemplated by the statute (1829) did not exist; that the defendant neither had the right to apply for, nor the court to grant, the order (for the purchase of the land); and that while nothing wrong might have been intended, it was a legal fraud upon the rights of the ward and should be set aside." Further: "that so far from the purchase being manifestly for the advantage of the ward, as the law declares it must be, it was manifestly subversive of her interest, present and permanent, and the defendants should be decreed to keep the land, and pay the ward the money on hand, (i. e. given in payment, \$702,) and interest thereon."

The bill of exceptions tendered by defendant's counsel, and signed and certified by the judge who presided at the trial, presents five distinct grounds of error:

1st. In refusing to require the legal representative of Samuel Thompson, deceased, who died intervening the first and second trial, to be made a party.

2d. In rejecting the parol evidence of the clerk of the Court of Ordinary.

3d. In not allowing the guardian to prove the payment of sundry debts contracted on account of his ward before, and paid after, his discharge.

4th. In charging the jury that the state of circumstances did not exist which justified John D. Stell, the guardian, to apply for, or the Court of

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Ordinary to pass, the order of March, 1840, authorizing the purchase of the land named therein.

5th. In charging the jury, that the purchase made under the order of the Ordinary, was a fraud in law, and manifestly destructive of the interest of the ward, and that the guardian should be decreed to keep the land and pay his ward the money laid out and expended therefor, with interest.

1st. Had the complainant's bill been framed differently, and for the single purpose of calling upon Stell, the former guardian, to account for the trust fund which came into his hands, in that aspect of the case it would not have been necessary to have made either of the Thompsons parties, nor would a demurrer, for want of proper parties, have been sustained.

And had they been joined as defendants, the death of one or both of them need not have arrested the progress of the proceedings. The complainant, however, has seen fit to insert their names, and to couple them with Stell, in a grave and substantial allegation, that the three fraudulently combined together to procure the passage of the order for the purchase of the land, and that it was bought and held for their benefit, and not for the use of the ward. And the bill seeks to have this conveyance canceled. The deed was made by Samuel Thompson, and reserves a life estate, in a moiety of the land, to Jeremiah Thompson. Are not the Thompsons, father and son, deeply concerned in the cause? They both answered the bill. The first finding charges *them*, together with Stell, with the payment of four hundred dollars, and vests the title to the land in the complainants. Samuel Thompson dies before the final trial; should not his representative be made a party?

The whole record goes up, his answer included. The question as to the *bona fides* of the transaction is still strenuously contested; and the jury upon the appeal decreed twelve hundred dollars for the complainants, and that the sale of the land be set aside. Can it be seriously contended that the estate of the deceased is not concerned in this issue?

But it is argued, and with much force and ability, that, inasmuch as Samuel Thompson failed or refused to join with Stell in entering the appeal, the case, as to *him*, ended with the *first verdict*. This assumption necessarily involves the construction of the act of 1839, passed to explain and amend the judiciary of 1799, as to granting appeals in certain cases.

The preamble sets forth the mischief which induced its passage; namely, that a contrariety of opinion existed among the judges of the State, and a different practice prevailed in the various circuits thereof, touching the right to appeal under certain circumstances. The evil alluded to was this: Some of the courts decided, that where there was more than one party, plaintiff or defendant, it was necessary that *all* should unite in entering the appeal, in order to carry the case up. To remedy this inconvenience, it was enacted:

Section 1st. "That from and after the passage of this act, it shall and may be lawful, whenever there shall be more than one party, plaintiff or defendant, and one or more of said parties, plaintiff or defendant, desire to appeal, and the other, or others, refuse or fail to appeal, it shall and may be lawful for any party, plaintiff or defendant, to enter his appeal, under such rules and regulations as are now provided by law."

Section 2d. "That upon the appeal of either plaintiffs or defendants aforesaid, *the whole record shall be taken up* ; but in case damages shall or may be awarded upon such appeal, such damages shall only be recovered against the party or parties appealing, and their securities, and not against the party or parties failing or refusing to appeal."

Section 3d. "That in case any such security or securities shall be compelled to pay off the debt or damages, for which the judgment may be entered in any cause, he, she, or they, shall have recourse only against the party or parties for whom he, she, or they, became security or securities."

Section 4th. Repeals all laws and parts of laws militating against the act.

Perhaps a more striking illustration of incautious and improvident legislation is not to be found in the statute-book. Better, far, the old law, with all its faults, than the new, whatever interpretation may be put upon it. It is a Cretan labyrinth, with no thread to assist in ferreting out its inextricable windings. Did it intend to limit the rights of appeal to that class of cases only, which seem alone to be contemplated in the *second* and *third sections*, to wit, where damages might be given for a frivolous appeal, leaving the law as it stood before in all other cases? Such would be the inference from these two sections—but such is not the restrictive language of the statute. What is meant by the whole record being carried up?

If the original papers are sent up with the appeal—as they are and must be—what remains for the foundation of the judgment to be signed, and the execution to be issued against the parties who loiter behind? Or is the to remain in abeyance until after the final decision? If so, upon what principle?

Take the case now before the court, and how irreconcilable this construction with the facts which it presents. There are three defendants: Stell and the two Thompsons. By the first verdict, the title to the land is vested in the complainants; by the second, it is reinvested in Samuel Thompson, from whom it was purchased. To whom does it belong? The complainants *below* recovered four hundred dollars, upon the basis of retaining the land; *above*, twelve hundred dollars, in consideration of relinquishing it. Can complainants collect the four hundred dollars of the Thompsons, who failed to appeal and retain the land; or twelve hundred dollars out of Stell, and surrender it? Are these monies deemed independent of each other? Or will the satisfaction of the latter extinguish the former, and of the former the latter, in whole or in part, *pro tanto*? We will forbear to press these inquiries further.

On the other hand, does the carrying up of the whole record carry up all the parties to it? And if so, would not the intention of the Legislature, as expressed in the second section, be clearly contravened, in subjecting parties who failed or refused to appeal, to heavier liabilities than were recovered on the first trial, and that, too, when forced to litigate further, without their consent and contrary to their wishes? and this injury, inflicted frequently by the will of a minority, contrary to the principles of common justice. In the very case before us, parties who refused to appeal from a verdict of four hundred dollars, are, or would be,

properly represented, subjected to the payment of twelve hundred

And yet, if the Legislature did not mean that the parties failing or refusing to appeal, should, nevertheless, in some sense, be parties to the appeal, why protect them from the damages which might be assessed upon the appeal, and from recourse over, at the instance of the securities on the appeal?

Leaving these and numerous difficulties to be adjusted when they arise, we are of the opinion, that Samuel Thompson was so far a party to this case, on the final trial, as to make it necessary that his legal representative should have been substituted in his stead.

2d. The competency of McBride will depend upon the object for which it is sought to introduce his testimony. Under the act of 1829, guardians are clothed with authority, under an order of the Court of Ordinary, to apply a portion of the disposable funds of their ward, to purchase such reasonable portion of land as may be necessary for cultivation by the slaves of the minor, when it is *manifestly expedient* to do so. Great discretion is allowed the guardian in this matter; but whatever might be his own views of expediency, still the Legislature deemed it proper to submit the question to the Court of Ordinary for its supervision, before the guardian could act. His duty in *the mode* of executing this power is not prescribed as it is in the sale of property. It must, of course, be performed with proper care and circumspection; and failing in this particular, he will be answerable to his ward for the waste or misapplication of the funds so applied, and we are inclined to think that the order itself would not have shielded him from responsibility, had it contained the terms which he proposes to supply by parol. In that event, the court would have exceeded its jurisdiction, and, therefore, the testimony, if legal, would not avail the defendant, nor do we believe it competent to vary or add to that order by oral proof. Still, we hold that the evidence was admissible for the purpose of rebutting the charge in the bill, that the order was fraudulently procured. The order being general, to buy land of Samuel Thompson, it might seem to condemn, on the face of it, the conveyance which was taken, with the reservation in favor of Jeremiah Thompson. The evidence of McBride rebuts that inference, and shows that Stell fully, freely and fairly, communicated to the tribunal, peculiarly charged with the protection of orphans' estates, his whole plan in respect to this transaction, and took their advice in the premises. It certainly disproves the imputation that the court was circumvented in granting the order, and that it was done, whether providently or not, with a complete knowledge of all the facts.

3d. Another question is, as to the rejection of the witnesses offered to prove the payment of certain debts contracted on account of the ward before, but *discharged* after, the dismissal of the guardian? None of the pleadings show, whether these accounts were made by the minor herself, or the guardian for her. Nor do we deem it material. In either event, there could be no equity in asking a decree for the trust fund, without first deducting from it the debts and disbursements with which it was properly chargeable. It is true, that the propriety of it would have been more manifest if the guardian had incurred *personal liability* on account of these debts, before obtaining his letters. Suppose a guardian should be removed by the court before he had an opportunity of settling his accounts, and making a return of them to

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the Court of Ordinary. Can it be for a moment doubted, that he would, in a bill for account, be allowed his credits for legitimate expenditures? It would be his misfortune that he had to resort to original proof, instead of casting the *onus* upon his adversary, by having returned his vouchers to the proper court, and thus made them *prima facie* evidence in his behalf. And a complaint, that he did not avail himself of this advantage, would not well lie in the mouth of his opponent. We are satisfied that the court committed error in refusing this testimony.

4th. Nor are we less upon this ground. The law constituted the Court of Ordinary, and not the judge of the Superior Court, the arbitrator as to whether or not, in March, 1840, a state of circumstances existed, which made it proper for the Court of Ordinary to pass the order at that date. The act of 1829 allows the guardian to invest a portion of his ward's funds in land, if it is expedient to do so; and whether it be expedient or not, is an inquiry committed exclusively to the Inferior Court sitting for ordinary purposes, unless contested by appeal. The order on their minutes shows that they acted in the premises, and having jurisdiction over the subject matter, and the persons before them, their judgment cannot be impeached or invalidated in this manner.

The judge of the Superior Court gave his opinion upon the testimony as exhibited on the trial before him, in 1846. But can he undertake to say upon what proof the Court of Ordinary acted, in 1840? Be it as it may, that court, and that court alone, was the proper tribunal to entertain the application, and to pass the order for the purchase of the property.

And the legal presumption is, that that court had sufficient evidence to warrant it in passing the order.—*Dubois vs. Dubois*, 6 Cowen Rep. 494. It may have acted unadvisedly; probably did, if the pecuniary interest alone of the ward was considered. It is wholly immaterial. The order being passed by a court of competent jurisdiction, and acting within the sphere of its authority, its proceedings cannot be attacked and set aside in this indirect manner.—1 *Pick. Rep.* 435; 6 *ibid.* 220; 10 *ibid.* 470; 4 *Day's Rep.* 432; 3 *Johns. Rep.* 17; 19 *ibid.* 39; 11 *Mass. Rep.* 445; 12 *ibid.* 25, 268; 1 *Peter's Rep.* 74; 7 *Cranck*, 400; 567; 2 *Nott and McCord*, 410; 6 *Sergt. and Rawle*, 57; 7 *ibid.* 16; 11 *ibid.* 436; 4 *Gill and John*. 1.

The Court of Ordinary, upon the point before them, acted judicially, and any error which may have been committed, cannot affect their jurisdiction, and take it away, because improperly exercised.—6 *John Ch. Rep.* 381; 8 *John. Rep.* 50; 8 *Cowen Rep.* 178; 3 *Cowen*, 24; 3 *Ohio Rep.* 567; 7 *Mass. Rep.* 79; 1 *Peter's Rep.* 340.

5th. Great latitude of discretion is allowed to courts, as to the direction they will give to the testimony. And while all admit the soundness of the maxim, *ad questionem juris respondeant iudices, ad questionem facti respondeant juratores*; that the judges are to answer to the question of law, and the jurors to the matter of fact; still, it is impossible to lay down any fixed rule, beyond which the judges shall not go, in expressing their opinion on the evidence, by way of charge to the jury; it is better, in this country, that they come short, than transcend, the limits assigned them.

The elementary writers, and reported cases, concur in maintaining

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that if the judge dictates to the jury the verdict, they shall render or deliver his opinion to the jury on a matter of fact, rather as *direction*, than *mere opinion*; that the charge should be reviewed for misdirection.

In the *Utica Insurance Company vs. Badger*, the court granted a new trial, because the judge erred in not leaving it to the jury, under proper instructions, to say whether the endorsement *was*, or *was not*, the hand-writing of the defendant.

The judge below simply charged the jury that the plaintiffs were entitled to a verdict.

In *Aylwin vs. Ulmer*, (12 Mass. Rep. 22,) the judgment of the Court of Common Pleas was reversed, and a *venire facias de novo* awarded, because "the charge was calculated to make the jury understand, that the evidence offered was wholly insufficient. *This was undertaking to judge for the jury, and amounted to a declaration to them, that any consideration of the evidence was wholly unnecessary. They must have received the impression, that by law, they could not, on that evidence, find a verdict for the plaintiff*" So, in *Tufts vs. Seabury*, (11 Pick. Rep. 142,) the verdict was set aside, and a new trial granted, *although justice had been done in the case*; because the judge instructed the jury that certain testimony proved a material fact, when, in truth, it was only evidence from which the jury might or might not have presumed such fact, and a verdict was rendered in conformity to the instruction.

In *Morton vs. Fairbanks*, (11 Pick. Rep. 370,) in a controversy about shingles, the court below took upon itself to charge the jury, from a personal inspection of the articles, which were brought into court, that *they were not shingles*. Upon this and another exception, a new trial was granted, on the ground "that the point thus decided, was a question of fact, and the jury may have been unduly influenced, for they may have considered themselves not at liberty to find contrary to the decision of the court.

In *Fisher's Executor vs. Duncan and Turnbull*, (1 Hen. and Mun. 563,) the Supreme Court of Virginia decided, that the County Court, on the trial below, erred, "in having instructed the jury, that from the whole testimony before them, the demand of the plaintiff was not barred by the act of limitations;" and Judge Fleming declared, that he conceived this to have been an improper interference and an infringement on the privileges of the jury, whose right it is to judge of the sufficiency of the evidence adduced to establish any fact, or facts, in the issue before them; *the province of the court being to see that all proper evidence offered (and none other) be submitted to the consideration of the jury, without saying what effect such evidence ought to have in the cause.*

So far is this doctrine extended in this State, (Va.) that the judges do not proceed to *sum up the evidence*, as is usual in England, and some of the other States; "a course," says Judge Tucker, "*which would, probably, be deemed with us an invasion of the privileges of jury trial.*"—*Commentaries*, vol. 2, 299.

In the *New York Fire Insurance Company vs. Walden*, (12 John. Reports, 512,) the court say: "And here, I apprehend, lies the error committed by the learned judge: that he has given a binding direction to the jury, upon matter of fact, as if it had been matter of law. If the charge had been intended as a mere opinion to the jury, on a matter of

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fact, on which they were to exercise their judgment, the jury would, undoubtedly, have been told, that the defence in the case rested upon the question of the materiality of the letters and facts not disclosed, and that *it was for them to judge, from the evidence, whether the disclosure would have varied the premium; and that, if the jury should be of the opinion that the facts not disclosed were, in that sense, material, they must find for the defendant; and that, if they thought otherwise, they ought to find for the plaintiff.* This would have been the language of a charge, suited to the submission of such a point.

"In order to preserve a just balance between the distinct powers of the court and the jury, and that the parties may enjoy unimpaired vigor—their constitutional right of having the law decided by the court, and of having the facts decided by the jury—every charge should distinguish clearly between the law and the fact, so that the jury cannot misunderstand their rights, or their duty, nor mistake the opinion of the judge, upon matter of fact, for his direction in point of law. *The distinction is all-important to the jury.* The direction of the judge in the one case is obligatory upon their consciences, and so they will, and so they ought to regard it; but his opinion in the other case is mere advice, and the jury are bound to decide for themselves, notwithstanding the opinion of the judge, and to follow that opinion no further than it corresponds with the conclusions of their own judgments. *Unless this distinction be kept steadily in view, and be defined with all possible precision, the trial by jury may, in time, be broken down, and rendered nominal and useless.*

"All that I feel it my duty to contend for is, that whenever the judge delivers his opinion to the jury, on a matter of fact, it shall be delivered as mere opinion, and not as direction; and that the jury shall be left to understand, clearly, that *they* are to decide the fact, upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt.

"I am disposed to hand to posterity the institution of juries, as perfect, in all respects, as we now enjoy it; for I believe it may, in time hereafter, be found to be no inconsiderable security against the systematic influence and tyranny of party spirit in inferior tribunals."

I have felt it my duty to transcribe into this opinion these eloquent remarks of the learned chancellor, alike creditable to his head and heart. Were their spirit more thoroughly infused into our system, we should no longer hear it cast upon it as a reproach, that the use of a jury is merely to screen the court from the responsibility and odium of a decision, which is, in fact, in most cases, the result of the judge's own view of the testimony. It is needless to preserve the *form* of trial by jury, if that body is deprived of its just powers and privileges. Under the infamous Stuarts, and their still more infamous tool, Lord Jeffries, it was, literally, "a nose of wax," to be moulded as the judge saw fit; and it should never be forgotten that Sydney and Russel were doomed to death by a jury of the country!

From an examination of the evidence, we are inclined to agree with the court whose judgment we have under review, that the trust confided to Stell, the guardian, was injudiciously exercised, and that no fault can be found with the verdict of the jury; still we cannot seal with our

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sanction a charge, which declares, authoritatively, that the defendant should be decreed to keep the land, and pay the ward the money on hand, (the purchase-money,) with interest. This is not the expression merely of an opinion, but is the very language of *direction* from the bench. In the case in 12 *Johnson* there is a precedent of a bill of exceptions, taken from 3 *Burr*. 1742, to a charge by Lord Camden; and it is in these words: "And the said chief justice did then and there declare and deliver his opinion to the jury, that the said several matters, so produced and proved on the part of the defendants, were not, upon the whole case, sufficient to bar the action, and with that opinion left the same to the jury." "In this case from *Burrow*," say the Court of Errors of it, (*Yer*. 15,) "it was never doubted but that the opinion of the chief justice, so stated in that bill, was taken and received as a direction in point of law; and if the charge in the case before us is not deemed of that character, it will be impossible hereafter to discriminate between a charge containing a positive direction in point of law, and mere advice on a matter of fact."

We are satisfied that no one values more highly the independence of "this body of twelve" than the learned and upright judge who made this charge; and that he would be one of the last to trench intentionally upon the rights and privileges of those who are selected to decide upon the estates, freedom and life of their fellow-citizens. We are constrained, from regard to principle, however, to sustain the exception.

Let the judgment be reversed.

No 70.—ROOSEVELT and BARKER, plaintiffs in error, vs. CHARLES J. McDOWELL, executor of RICHARD S. WALKER, deceased, defendant in error.

The executor of a deceased copartner cannot be sued at law for a copartnership debt. The surviving copartner is alone liable to be sued therefor.

This was an action brought by the plaintiffs in error against the defendant in error, in the Superior Court of the county of Pike. The record disclosed that the note sued on was made by the defendant's testator while in life, and one Jeremiah Leak as copartners in trade, under the partnership, name and style of Walker and Leak, and that, at the time of the institution of the suit, the copartner Leak was still surviving. The defendant pleaded the general issue, and also *plene administravit*. Upon the first trial the defendant confessed judgment and appealed. While the cause was pending on the appeal, the plaintiffs by leave of the court amended their declaration by adding a count for money had and received.

At February Term, 1846, of the court below, this cause came on to be tried before Judge Floyd, when the counsel for the defendant der-

to the action, insisting that the representative of a deceased partner was not liable to a suit at law upon a partnership debt, but that the plaintiffs' only remedy at law was against the surviving copartner. The counsel for the plaintiffs in reply contended, that although, anterior to the act of 1818, this was true, yet that act authorized plaintiffs to sue either the representative or the survivor separately, or both jointly—whereupon after argument of counsel, the court below held that the said act of 1818 did not authorize the plaintiffs to sue the representative of the deceased partner separately at law, and accordingly nonsuited the plaintiffs.

Afterwards and during the same term, the counsel for the plaintiffs moved a rule to set aside said judgment of nonsuit, and to reinstate the case upon the following grounds:

1st. Because the court erred in deciding, that by the act of 1818, the representative of a deceased partner could not be sued separately at law.

2d. Because the court nonsuited the plaintiffs alone on the case made by the plaintiffs' declaration.

Which rule was refused by the court below, and the motion of plaintiffs' counsel denied.

To which decision the counsel for plaintiffs excepted.

JAMES M. CALHOUN, representing WILLIAM W. ARNOLD for the plaintiffs in error.

After stating the facts of the case and adverting to the hardship of being compelled after the appeal, on a mere technicality, to bring this writ, insisted:

1st. That this case presents the question of a right construction of the act of 1818.—*Prin. Dig.* 443. In the determination of which it becomes necessary to look to the law anterior to its passage, and the defects in that law, and the remedy proposed by this act, provided the act be a remedial act; and

1st. What was the law before its passage? We admit that anterior to its passage, the practice of the courts of law was to "compel" "holders of notes" signed by partners, one of whom was dead, to sue the survivors alone. But was this law? In such cases there was no survivorship; but the representatives and the survivors became tenants in common of the partnership effects, which after the debts were paid, were to be divided among them in proportion to their interests.—*Gow on Part.* 348; *Collyer on Part.* 65.

The estates of both the deceased as well as of the survivors, are eventrally liable to the full payment of all the partnership debts.—*Gow on Part.* 359; *Collyer on Part.* 343, 350; 2 *John. C. R.* 511. And it is not necessary to sue the survivors to insolvency in the first instance, before resorting to the estate of the deceased.—3 *Ves.* 566; 1 *Mylne and Keene R.* 582-7; *Cond. Rep.* 176. At law in case of death of one of the partners, it became impossible, as was supposed, to join the representative of the deceased partner in the action with the survivor, because the judgment would be different; one *de bonis testatoris*, and the other *de bonis propriis*.—*Gow on Part.* 359.

But I believe it never has been expressly decided in an action like the present against the representative of the deceased alone at law, that you could not recover. The practice arose out of the doctrine contained in the proposition immediately preceding, that the judgment would be different in connection with the form of the contract. But we insist that this practice of suing the survivor alone, was not law, and in support of our position insist that, by the law-merchant-partnership contracts like the present, though joint only in form, were joint and several—as by that law, and it was a part of the common law, no survivorship was allowed. From which we argue inferentially that the note must have been joint and several. For survivorship at common law is the necessary consequence of

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the death of a joint owner or holder. And if the partners are not joint owners, they could not be jointly bound. Again: we insist that in equity, which more fully recognizes the true principles of the *Lex mercatoria*, partnership contracts have always been looked upon as joint and several.—*Gow on Part.* 359; *Collyer on Part.* 343, 350; 1 *Peters Rep.* 317.

So if one partner has had to pay more than his share of the debts, he could call on the other to contribute.—*Gow on Part.* 359; 2 *John. Ch. Rep.* 397.

If, therefore, a partnership note be joint and several, by the law-merchant, and that law be a part of the common law of the land, certainly after the death of one of the partners, a several suit could have been maintained on it against the representative of the deceased partner. We admit that during the life of all the partners, the action might be defeated. But that is not the question. It is, Can a several suit, after the death of a partner, be maintained against his representative? Then the *practice* has been contrary to law. But it is urged that if this be so—if the note be joint and several—then in case of death and a suit against both, the judgments would be different. This objection would now apply with equal, if not greater force under the act to joint promisers, who it is admitted are included and intended in the act. But our case is not obnoxious, even to this objection: we have sued only the representative, and our judgment will be *de bonis testatoris*. Hence, whether the law anterior to the passage of this act was in accordance with the practice or not, in either case our suit might have been maintained; in the former case the legislature intended to change the practice and the act became and was a remedial one; if the latter, the legislature intended for some cause to correct the illegal practice and establish the law, and the act was both remedial and declaratory. In either case we are in its letter, and this was admitted below.

2d. What remedy does the act give? It admits before its passage, in case of a joint note and death of one of the makers, "the holder" was "compelled" by the "usage" and "custom" of courts of law "to sue the survivors alone." It looks upon this "usage and custom" of the holder's being "compelled" to sue the survivors alone as a hardship on the "holder," which required a remedy. It affords this remedy by giving the holder the legal right "to sue the survivors or the representative, or both jointly or severally," "at his discretion." In addition to this, the courts of law had compelled holders to sue in equity, which the legislature also intended to remedy. Before its passage our only remedy against the estate of a deceased partner was in equity.—*Gow on Part.* 359.

The court erred in nonsuiting us on the facts stated in the petition alone, because there was a count therein—a common count—against the defendant, in his representative character alone, for money had and received by his intestate. If we could have proved this, the court erred. They had not pleaded the non-joinder of Leak in abatement, and could not have prevented a recovery.—1 *Peter's Rep.* 317.

3d. Again: a prior motion might have been made to dismiss the appeal; for the defendant had confessed a judgment, and appeals lie not from confessions.

SAMUEL T. BAILEY, for the defendant in error.

This is an action at law against McDowell, executor of Richard Walker, late partner of the firm of Walker & Leak, for the recovery of a firm-debt, without joining the other partner, and without having sued him to insolvency.

We maintain that the executor cannot be sued at law at all, nor in equity, without joining the survivor.

On the death of Walker, all the choses in action, debts, and credits of the firm, vested in the survivor, and he alone had the right to possess them.—*Story on Partnership*, 494.

At law, the creditors have no remedy save against the survivor.—*Ib.* 513; 1 *Chitty's Pl.* 39, 40.

The representative of the deceased may be sued in equity.—*Story on Part.*

But then the survivor must be joined.—*Ib.* 515.

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Mr. Story seems to hold, on the authority of some modern decisions, that such suit in equity may be maintained, although the survivor is not insolvent. But Mr. Collyer controverts this doctrine, and holds these modern decisions of doubtful authority.—*Collyer on Part.* 337 to 347. See also 3 *Paige Rep.* 167; 1 *Binn.* 123; 1 *Rawle*, 212; 1 *Har. and G.* 96.

The bill must expressly charge that the survivor is insolvent.—1 *Gallison*, 371, 630.

If the English judges fluctuate, we ought to adhere to the decisions prior to the revolution.—*Cathcourt vs. Robinson*, 5 *Peter's Rep.* 280.

But however the law may be, as to the right to sue in equity before insolvency of the survivor, it is agreed that by the law as it stood prior to 1818, the representative of a deceased partner could not be sued at law, nor in equity, without joining the survivor in the bill. But the plaintiff in error contends that the statute of 1818 (*Prince*, 443; *Hotchkiss*, 545) changed the law, in this particular, so that he has his option now to sue them both together, or each separately, and that at common law. If this be so, it is a great—not to say alarming—change in the rights and protection which the law once threw around the often minor heirs of deceased partners. It is not pretended that the law of partnership which vests all the choses in action, debts, and rights of action, in the survivor alone, is changed. Are we authorized, then, to presume that it could have been the intention of the Legislature to effect such gross injustice as to take from the deceased partner's representatives the means, and often the only means, of paying the debts of the copartnership, and vesting them in the survivor, and at the same time hold the representative liable to pay those debts, and the wife and children of the deceased liable to be stripped of all their separate private property, while a dishonest survivor holds partnership funds more than sufficient to pay the debts of the firm? Such a presumption is unauthorized without the plainest and most undoubted declaratory language expressing such intention. Does the act in question manifest such intention? We contend that it does not. We maintain that the act of 1818 does not apply, and was not intended to apply, to copartnership debts. Its words are "When any person shall be in possession (either in his own right or any other capacity) of any note, bill, bond, or other obligation in writing, signed by two or more persons; and one or more of the persons whose names are so signed, as aforesaid, shall die before the payment of the money, or the compliance with the condition of such bond, or other obligation in writing, the person or persons holding such note, bill, bond, or other obligation in writing, shall not be compelled, as heretofore, to sue the survivor or survivors alone, but may, at his or their discretion, sue the survivor or survivors, or the representatives of such deceased person or persons, or the survivor or survivors, in the same action with the representative or representatives of such deceased persons."

Now, the first inquiry is, what change was effected, and what mischief remedied by this statute? It is obvious that the Legislature had in view a class of contracts which two or more have subscribed, and yet, if one dies, the sole remedy at law is against the survivor; and they intended to remedy the mischief of permitting this liability and right of action going with the dead to the grave. What were these contracts, the remedy upon which is so altered, and as to which such great change in the common law was effected? The common law said, that if one of the joint-makers and signers of a note, bill, bond, or other obligation in writing, die, the sole remedy at law on such instrument is against the survivors. This the Legislature looked upon as an evil, because, in such joint contracts, the presumption of law and fact is, that each joint contractor has received value, and that the benefit has descended to the estate of the deceased, as in case of other joint and several contracts, and that the means of paying have not been taken from the representative as in case of deceased partners. This mischief they intended to remedy, and we contend they have taken especial care to make manifest their intention. Instead of saying that, in case any one of any joint debtors shall die, his representative shall be liable to be sued in the same manner, and in all such cases, as his testator or intestate would have been liable on such contract or

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contracts, had he lived, (thus including partnerships' contracts as well as others,) they have carefully guarded their expression by the term Writing, *signed* by two or more *persons*, "and one or more of the *persons* whose *names* are so *signed* as aforesaid."

Now, I hope the court will pardon me, if I so far draw upon the form-book of our science, as to remind the court that the name of a firm, and the moneys of the *persons* composing such firm, are in law apart and distinct; that to speak of a note or bill, signed with a firm-name, conveys wholly different legal ideas of such instrument than are conveyed in speaking of an instrument *signed with names of persons*; that to say a note is signed with the name of Roswell King, James Donwoody, and James Bullock, persons composing the Roswell Manufacturing Company, is not equivalent to saying the note is signed with the firm-name of "the Roswell Manufacturing Co."

If a note, subscribed with a firm-name, were sued on, and declared to be signed and subscribed by the names of the persons composing such firm, would any court sustain such an action? That they would not, is too well settled to argue. Then, certainly, the Legislature have not, by the terms used, included contracts signed with firm-names, and the court never construes liberally a statute changing the common law, except for the suppression of fraud; more especially, if such construction would work hardship.

But let us suppose the Legislature intended to include all joint contracts, those of partnership as well as others. They have employed language the most inappropriate, with a prolixity wholly unnecessary to effect such a purpose, and, in the end, wholly failed to effect their object: for it is admitted that this statute applies only to contracts in writing, signed with the names of the persons contracting. Now, it is well known that such contracts comprise but a small part of partnership contracts, so that this absurdity would follow from the position of the counsel for plaintiff in error. On contracts signed in writing, the representative of a deceased partner would be liable; but on contracts not so signed, he could not be sued.

But the Legislature have shown that they were careful not to tamper with the delicate machinery of the law of copartnership. They have been careful, when they would legislate upon the subject, or effect any material change in that law, to employ language that all may understand. In the act of 1820, conferring the right to sue copartners and joint contractors residing in different counties, they have carefully used the term "joint contractors or copartners."—*Prince*, 446.

Again: in the act of 1837, authorizing limited copartnerships, the 4th section requires the *persons*, desirous of forming such copartnership, to sign a certificate which shall contain, 1st, the *name* of the firm; 2d, the *names* of the parties. Sec. 5th requires the certificate shall be acknowledged by the *persons signing* the same. Sec. 12th declares every alteration in the *names* of the partners a dissolution.

Again: the act of 1838 authorizes a partner, or one jointly interested in a suit, to sign the *names* of the partners, or persons jointly interested, to all necessary bonds. All which clearly shows the Legislature well understood the distinction between ordinary joint contracts and contracts of copartners, and also the difference between an instrument signed by a firm-name and one signed with the names of the *persons* composing that firm—the difference between an instrument signed with a corporate name and one signed with the names of the *persons* composing the corporation.

By the Court—WARNER, Judge.

This action was instituted on a promissory note, signed with the copartnership name of Walker and Leak. The defendant in error was sued thereon, as the executor of Walker—Leak, the other copartner being still in life; and the question is, whether the executor of a

ceased copartner can be sued at law, for a copartnership debt; or whether the surviving copartner is alone liable to be sued therefor. By the common law it is admitted, the representative of the deceased partner could not be sued for a copartnership debt; but that the survivor was alone liable to be sued. It is, however, contended that the act of 19th December, 1818, (*Prince's Dig.* 443,) alters the common law in this respect. That act declares, "Where any person shall be in possession (either in his own right or in any other capacity) of any note, bill, bond, or other obligation, in writing, signed by *two or more persons*, and one or more of the persons whose names are so signed as aforesaid, shall die before the payment of the money, or the compliance with the condition of such bond or other obligation in writing, the person, or persons, holding such note, bill, bond, or other obligation in writing, shall not be compelled, as heretofore, to sue the survivor, or survivors, alone, but may at his, her, or their discretion, sue the survivor, or survivors, or the representatives of such deceased person, or persons, or the survivor, or survivors, in the same action with the representative or representatives of such deceased person or persons, any law, usage or custom, to the contrary notwithstanding." This act declares, when any note, &c. shall be signed by "*two or more persons*," that is, when two or more individuals shall sign a note, as two obligors, or joint promisers, with their *separate names*, the representative may be sued, &c. This act, being in derogation of the common law, must receive a *strict* construction, and, in our judgment, was not intended to embrace partners, where the partnership name alone is used. By the common law, when one or two co-obligors died, his executor, or administrator, was discharged from liability, and the survivor alone was liable to be sued.—1 *Chitty Pl.* 37.

We are the more inclined to give this act a strict construction, so as not to include partners, for the reason the surviving partner has the right to control the partnership effects, for the purpose of paying the copartnership debts; and as copartners are not included within the letter of the statute. We think it can have effect without including them, and there are strong reasons why the executor of a deceased partner, who has none of the copartnership effects in his possession, should not be sued at law for a partnership debt. Therefore, let the judgment of the court below be affirmed.

No. 71.—TOWNSEND AND BROTHERS, plaintiffs in error, vs. JAMES M. DAVIS, defendant in error.

It is a general rule, that no person can bring a writ of error to reverse a judgment, who was not a party, or privy to the record, or prejudiced by the judgment.

Whether a plaintiff in error be a party, or privy, or is aggrieved by the judgment, must appear by the record.

The defendant in error had sued out an attachment against John B. Davis, predicated upon a note due the Central Bank of Georgia, of which the said John B. Davis was maker, and the defendant in error the last endorser; the said John B. Davis having moved out of the State, and the defendant in error having been sued as said last endorser, and judgment rendered against him.

The case founded upon this attachmant came on to be tried on the appeal before Judge Floyd, in the Superior Court of Houston County, at April Term, 1846, when counsel for the plaintiffs in error, Townsend and Brothers, being attaching creditors of said John B. Davis, whose attachment was junior in point of time to the attachment sued out by the defendant in error, were, at their request, permitted by the court below to appear as *amici curiæ* in defence of said John B. Davis who himself had not appeared, nor had any replevy been made so as to authorize any defence in his name.

The counsel for Townsend and Brothers, so permitted as aforesaid to appear as *amici curiæ*, proceeded on the trial to make various points, and to take several exceptions to the attachment in said case, all of which were overruled by the court below. Whereupon the said counsel as *amici curiæ* excepted, and assigned error in the decisions of the court below, in overruling the several points made by them.

The points decided by the court, and the grounds of error are omitted, as they were not adjudicated by the Supreme Court.

The counsel for the defendant in error joined issue upon the assignment of error with a *protestando*, reserving the right to move to dismiss the writ of error, on the ground that the plaintiffs in error were not parties to the record, nor affected by the judgment rendered in the court below, and that the counsel for the plaintiffs in error, as *amici curiæ*, had no right to except to the judgment of the court below, nor to sue out any writ of error in the premises.

AMOS W. HAMMOND and WILLIAM W. ARNOLD, for the plaintiffs in error.

SAMUEL D. KILLEN, for the defendant in error.

By the Court—NISBET, Judge.

Upon the trial of this attachment below, Messrs. Hammond and Arnold, who were counsel for Townsend and Brothers, being also attaching creditors of John B. Davis, were permitted to appear as *amici curiæ* in defence of John B. Davis. As friends of the court, they took a number

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exceptions to the attachment first sued out by the defendant in error. James M. Davis. These exceptions were overruled. Whereupon Townsend and Brothers, designating themselves as *amici curia*, brought this writ of error. The motion now is, by counsel for defendant in error, to dismiss the writ upon the ground that Townsend and Brothers were no parties to the proceeding below, and do not appear by the record to be in any manner affected by the judgment. The fact, that the court consented to take the counsel of Messrs. Hammond and Arnold in the case, who were the attorneys for the plaintiffs in error in another cause, does not give them the right to bring this writ.

It is a general rule, that no person can bring a writ of error to reverse a judgment, who was not a party, or privy to the record, or prejudiced by the judgment.—6 *Wheaton*, 260; *Tidd's Practice*, 1135; 2 *Bacon's Abr.* 195; 2 *Williams' Saunders*, 5th edit. 46 a, (6) 101 e.

Whether the plaintiff in error be a party or privy, or is aggrieved by the judgment, must appear by the record. A court for the correction of errors cannot, at common law, hear evidence to determine whether a party seeking a reversal, is aggrieved by the judgment. Its commission is to examine the record upon which judgment was given, and upon such examination, to reverse or affirm it.—*Tidd*, 1134; 1 *Str.* 607; 2 *Law Ray*. 1403; 2 *Bac. Ab.* 187; 6 *Whea.* 264. If this question was not settled thus at common law, the act of the legislature organizing this court is conclusive upon it. In the fourth section of that act, it is declared: "that said Supreme Court shall hear and determine upon matters contained in the transcript of the record of the cause, and not otherwise." The plaintiffs in error, upon opening this record, do not appear to be parties, or privies, or in any way aggrieved by the judgment.

The motion is sustained, and the writ of error dismissed.

No. 72.—JAMES MCGINNIS and STEPHEN MCGINNIS vs. JOHN MCGINNIS. In error.

If a testator should bequeath a negro belonging to his son A to his sons B and C, he should, in the same will, give to his son A a legacy of \$500, A will be put to his election, which he will take; and he will be compelled, by a decree in equity, either to relinquish his title to the slave, or the bequest under the will.

It is sufficient to waive a case of election, that the testator does dispose of property which is not his own.

The doctrine of election does not apply to *residuary legatees as such*. The individual may, however, be both a *specific* and *residuary legatee*.

There is no time prescribed, within which either party shall claim the right of putting the other to election. Each case must depend upon its own circumstances.

Where the recusant legatee has already received a part or the whole of the bequest under the will, and subsequently recovers property under his independent title, which has been bequeathed by the testator to a third person, he will be decreed either to refund the money, or restore the property.

This was a bill in equity, tried in the Superior Court of the county of Annet, before Judge Dougherty, at March Term, 1846.

The bill was filed by the plaintiffs in error against the defendant, returnable to the September Term, 1843, of said Superior Court, and charged, that on the 10th day of December, 1843, one James McGinnis, Senr., then of said county, made and published his last will and testament, as follows :

"In the name of God, amen ! I, James McGinnis, Senr., of the State of Georgia, and county of Gwinnett, considering the uncertainty of this mortal life, and being of sound disposing mind and memory, (blessed be Almighty God for the same,) do make and publish this, my last will and testament, in manner and form following : that is to say, 1st. I will and bequeath unto my beloved wife, Elizabeth, the use of my plantation, and house, and household furniture, on the lot where I now reside, and the labor of my two slaves, Winney and Harry, and my mule Jinney, during her lifetime ; also two choice cows and calves, and a choice heifer and steer, five choice fattening hogs, and one choice sow and pigs, and eight shoats, and fifty barrels of corn, and twenty-five bushels of wheat, and two choice ewes, and two choice wethers, in lieu of her dower, and it is also my will and desire, that my daughter Margaret share equally in the above bequests during her mother's lifetime, if she continue to live with, and take care of her mother. Secondly : I will and bequeath unto my son, James McGinnis, all that tract or parcel of land, known as lot number five hundred and thirteen; in the first district and first section of originally Cherokee, now Forsyth county, to have and to hold the same, containing forty acres more or less, to the only free use, benefit and behoof, of him, the said *James McGinnis*, his heirs and assigns forever, in fee simple.

Thirdly. I will and bequeath unto my son, *Stephen McGinnis*, all that tract or parcel of land, known as fraction number sixty-six, in the first district and first section of originally Cherokee, now Forsyth county, containing twenty-six acres, more or less, to have and to hold unto the said *Stephen*, his heirs and assigns forever, in fee simple.

Fourthly. I will and bequeath unto my daughter Margaret, my young mare, and three negro slaves, to wit : Violet and her two children, Lewis and Phil, to the only free use and benefit of her, the said Margaret, her heirs and assigns forever.

Fifthly. I will and bequeath unto my two daughters, Elizabeth Sailors and Keziah Fitzpatrick, the sum of five hundred dollars each, to be paid to each of them personally, for the sole and exclusive benefit of each of them and their heirs ; and to my daughter Nancy Jenkins, I will and bequeath the sum of one hundred and fifty dollars ; and to my three sons, William McGinnis, Alexander McGinnis, and *John McGinnis*, I will and bequeath the sum of five hundred dollars each ; all the several sums named to be paid by my executors within two years from the date of my decease.

Sixthly. I will and desire that all the balance of my property, after paying the above bequests, and all my just debts, and the expenses of a decent burial, be equally divided between my two sons, *James McGinnis* and *Stephen McGinnis*, viz : one hundred and twenty-five acres of land, more or less, being part of lot number two hundred and thirty-seven, in the seventh district of Gwinnett county, and lots number one thousand six hundred and one, and one thousand and fifty-eight, in the second district ;

first section of originally Cherokee, now Forsyth County, containing each forty acres, more or less; and my slaves Ben, *Booker*, Sam, Wilborn, Jinny, Charlott, Dinah, and her daughter Winney, to have and to hold all and singular the said property, as also my two slaves Winney and Harry, and the mule Jinney, at the death of my wife Elizabeth, to the only free use and benefit of the said James and Stephen, and their, and each of their heirs and assigns forever, in fee simple, after paying the above-named bequests. Also, I will and desire all the balance of my property, consisting of live stock, working tools, books, notes, accounts, and ready money, and all other property of which I may die possessed, be equally divided between my two sons, *James McGinnis* and *Stephen Mc Jinnis*, and I do hereby constitute and appoint my two sons, *James McGinnis* and *Stephen McGinnis*, executors of this my last will and testament; hereby revoking all former wills by me made. In testimony whereof, I have hereunto set my hand and seal, the tenth day of December, one thousand eight hundred and thirty-eight." The words "in lieu of dower," were interlined before signing, &c.

Upon the death of the testator, which occurred shortly thereafter, this will was admitted to probate and record, and the executors therein named qualified.

The bill further charged, that, previous to the September Term of the Superior Court of said county, 1840, the plaintiffs in error had, at four several times, paid John McGinnis one hundred and thirty dollars of his legacy of five hundred dollars. And that afterwards, on the 23d day of October, 1840, the plaintiffs in error, in consequence of a promise made by John McGinnis, that he would come to a fair settlement with them, and receive no more than his equitable share of the estate, according to the will, paid him the further sum of fifty-two dollars toward his legacy, all which payments were made by James McGinnis, and receipts therefor were taken in his name; and that John McGinnis, at the sale of the perishable property of the estate, purchased thereof to the amount of ninety-two dollars, and gave his note, payable to James McGinnis individually, therefor, with an express verbal understanding that the same should also go as part payment of his legacy. That John McGinnis commenced his action of trover returnable to the September Term, 1840, of the Superior Court of said county, against James McGinnis, for the recovery of *Booker*, willed to complainants. And at the March term of said court, 1843, recovered the sum of eight hundred dollars, with the liberty to the defendant to discharge the same by delivering to the plaintiff said slave *Booker*, within fifteen days from that time, and also the sum of two hundred and forty dollars for the loss of said negro, and costs of suit. That the verdict and judgment had been fully complied with, and discharged. That *Booker* had been in the possession of the testator for many years previous to his death; and that the complainants believed that the title to said slave was in the testator at the time of the making of said will, and at the time of his death; and that on the faith thereof, they had accepted the legacy bequeathed to them in the will, and had taken upon themselves the burthens therein imposed, and undertaken the payment of the legacy therein appointed, out of said property to them bequeathed; and that

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the complainants did not know that John claimed title to said slave until after they had paid him said four first payments, and taken his note as aforesaid, and commenced paying the legacies to the other general legatees. And that afterwards, John McGinnis commenced his action of assumpsit, returnable to the September Term of the Superior Court of said county, eighteen hundred and forty-one, against complainants, for the recovery of the whole of said legacy of five hundred dollars. And that the cause was still pending on appeal. That John McGinnis was unable, from pecuniary embarrassments, to respond to said complainants, should he be permitted to recover said legacy in full from them at law, and that he refused to allow the five receipts, and said notes as offsets in the action of assumpsit. The bill prayed that John McGinnis should be perpetually enjoined from the further prosecution of his action of assumpsit, and that he be decreed to refund the complainants the several sums so paid him, as parts of his legacy, and the amount of said note, with interest, or to return to the complainant the boy *Booker*, with said sums so paid him for hire, &c., upon complainants paying to him the balance of said legacy, (should any be found due.)

The answer of the defendant admitted all the material charges above mentioned, with the exception of the promises made at the time of the payment of the last sum mentioned, of said legacy.

The cause was submitted to the jury on the bill and answer, with the exhibits thereto, and the parol testimony of Isaac Gilbert, who proved that he was acquainted with the slaves of the testator in his lifetime; that he had *Booker* in his possession for several years previous to his death, and that he had no other negro of that name, so far as witness knew: whereupon, the court below charged the jury that the principle of forcing legatees to make an election was purely an equitable right; that at common law the defendant was entitled to both the pecuniary legacy and the boy *Booker*, if he could show his title to the negro. That the bill sought, on principles of equity, to compel the defendant to elect either to take the boy and give up the legacy of \$500, or take the legacy and return the negro with the hire which he had before recovered in an action of trover. That the jury should inquire and determine whether, from the whole will, the testator intended that the defendant should take the \$500 legacy, or the boy, and not both; that if they found the former to be his intention, then the defendant would be put to his election, unless relieved upon some other principle. The court below further charged the jury, that the principle of election could not be enforced in favor of residuary legatees; that it applied only to specific legatees, and was adopted on the principle of remunerating the legatee, disappointed by the claim of his legacy by some other legatee, under the will. That they should decide, from a consideration of the whole will, whether the complainants were residuary or specific legatees; that in arriving at a conclusion upon this point, they would take into consideration the fact that the complainants had specific legacies given them in former parts of the will, as any other facts appearing on the face of the will, either from its language or other clauses; that if they found the complainants to be residuary legatees, then they had no right to put the defendant on his election, and they should find for the defendant. That if they found the intention of the testator to

to put the defendant on his election, and that the complainants are specific legatees, then they should find for the complainants, unless some other principle intervened. That so far as the acts of the defendant showed any intention to elect, they were in favor of the \$500 legacy. The complainants, who are executors of the testator, had assented to the five hundred dollar legacy, and had paid defendant a part thereof, before defendant claimed the negro; that even after he had commenced the action of trover, they paid fifty-two dollars of the legacy; that they resisted his claim to the negro, and forced him to incur large expense in obtaining his property; that coming into a court of equity, they should show that they had done equity; that to force the defendant to make his election, they should show a case where he could elect free from any restraint from extraneous circumstances. That the complainants had no right to resist the title of the defendant to the negro to their utmost, and wait till he had expended large sums in costs, in prosecuting his claim; that they had no right to take the benefit of the chances in litigation, in the action of trover, and failing there, they should seek to put the defendant to his election. That the complainants, if they had a right to force an election, had come too late; that they should have called on the defendant to make his election in equity, while he could do so on equal and fair terms. That the complainants had paid the defendant a part of the legacy before the action of trover was commenced; that at law such payment was legal and voluntary; and that even if defendant were put to his election, the complainants could not recover back the money so paid. The jury, under said charge, found for the defendant. Whereupon, the plaintiff in error excepted to the decision and charge of the court below, and alleged error therein as follows:

1st. The court erred in charging the jury that they should determine whether it was the intention of the testator to put the defendant to his election.

2d. That they should find whether complainants were specific or residuary legatees.

3d. That if complainants were residuary legatees, they had no right to put the defendant on his election.

4th. That the complainants came into equity too late; that they had no right to resist the claim of the defendant to the negro at law, and failing there, then to seek to put him to his election in equity.

5th. That the complainants could not recover back the part of the legacy by them paid the defendant, before the action of trover was commenced, &c.

JAMES P. SIMMONS, for the plaintiffs in error, made the following points, and insisted that the court below erred in charging the jury.

1st. That the jury should determine whether it was the intention of testator to put the defendant to his election.

This, we insist, is an inference of law, enforced in equity upon the facts, admitted or found.

2d. That they should find whether complainants are specific or residuary legatees.

This, we insist, is a question of law for the determination of the court.

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3d. That if complainants were residuary legatees, they had no right to put the defendant on his election.

We insist that the true question is, whether the negro slave in dispute, *Booker*, was bequeathed to complainants and plaintiffs in error as a specific, general or residuary legacy.

4th. That the complainants came into equity too late; that they had no right to resist the claim of the defendant to the negro at law, and failing, then to seek to put him to his election in equity.

Plaintiffs in error insist that they were not bound to put defendant on his election until the estate and title to the negro was ascertained. That this is a case of implied election, growing out of the verdict of the jury, finding the negro *Booker* to be the property of defendant.

5th. That the complainants could not recover back the part of the legacy by them paid the defendant, before the action of trover was commenced, &c.

We insist, that they should recover such payments back, (if defendant retains the negro,) upon the ground that they were made by plaintiffs in ignorance of their rights and liabilities.

The counsel submitted, in support of their position, the following authorities:—*Story's Commentaries on Equity*, 2d ed. vol. 2, top page, 335, *et seq.*, tit. *Election, and Satisfaction*; *Roper on Legacies*, 1st Amer. ed., vol. 2, tit. *Election*, page 378 *et seq.*; *Williams on Exrs. and Admsrs.* 1033, *et seq.*; *Whistler vs. Webster*, 2 *Vesey, Jr.* 371-2; *Lady Cavan vs. Pulteney*, *ib.* 558 *et seq.*; *Wilson vs. Lord John Townsend*, *ib.* 695-6; *Tomlin. Law Dic.*, vol. 1, tit. *Election*, 627, and authorities there cited.

GREEN B. HAYGOOD and JOHN R. ALEXANDER,

Insisted that this is not a proper case for the application of the doctrine of election.

1st. Because such an intention is not expressed in the will or clearly implied.—2 *Roper on Leg.* 389; 2 *Story Eq.* 349.

2d. Because the necessary accounts have never been taken so as to enable the defendant to elect with a full knowledge of all his rights, and that complainants came too late to put defendant to his election, after having resisted his title to the negro *Booker*, and compelled him to assert his paramount title at law.—2 *Rop. on Leg.* 395; 2 *Story Eq.* 359; 1 *Bailey's Eq. Rep.* 324, 330.

3d. Because the complainants cannot call upon the defendant to elect between his specific legacy and his own paramount title to *Booker*, they being residuary legatees under the will, and not entitled to call upon anybody to elect.—2 *Roper*, 433; 2 *Vesey, Jr.* 544, 561. As to what constitutes them residuary legatees under the will, *vide* 1 *Hill C. R.* 308; 1 *Russell*, 26; 2 *Roper on Leg.* 457.

4. Because the testator had a present interest in the negro, to wit, the possession, the devising of which to the residuary legatees is not inconsistent with the paramount title of the defendant.—2 *Story Eq.* 352; 1 *Vesey, Jr.*, 515, 523.

5th. Because the claim of the defendant to the legacy is not inconsistent with the provisions of the will in favor of the complainants, as illustrated by the common cases of legacies to widows, entitled to dower by law.—2 *Roper*, 415-16-17; 2 *Story*, 350-1-2; *J. C. R.*, 447, and cases there cited.

JUNIUS HILLIER, for the plaintiffs in error, in conclusion, was stopped by the court as he was about to proceed.

By the Court—LUMPKIN, Judge.

Before examining specifically, and in their order, the several positions assumed by the plaintiffs in error, I would remark, that the doctrine of election is somewhat new in our courts. Like much of our jurisprudence, it is derived from the civil law; and is founded in good sense. It allows no person to accept and reject the same instrument. If he accepts a be-

esit under a deed or will, he must not decline the burden which it imposes, or this would be to defeat and defraud the design of the donor. He must adopt *the whole*, conforming to all its provisions, and renouncing every right inconsistent with it.—2 *Story's Eq. sec.* 1077.

There are cases of express or positive election, as that of *Wilson vs. Arny*.—2 *Dev. and Bat. Eq. Cas.* 376. The testator of the plaintiff duly made and published his will, whereby he gave and devised to his son, "Christy Arny, his heirs and assigns for ever, the plantation whereon he then resided; but if he should make choice of the lot in Lincolnton, in preference to my home plantation, my will is, that he shall have the same in fee simple. In that case I will and direct my executor to sell my said plantation, and the proceeds to go in discharge of the money legacies herein bequeathed. But if my son Christy should elect to keep my home plantation, in that case the said lot shall be sold, and the sum arising therefrom go to the discharge of said legacies."

Here was a clear case of election created expressly by the testator himself. Accordingly it was decreed—that the legatee, Christy Arny, must renounce the plantation devised to him, unless, within a reasonable time, he declares his election before the master to keep it; and in that case join in the sale and conveyance of the Lincolnton lot for the purposes of the will.

But there are cases also of implied or constructive election, as that of *Key vs. Griffin*, 1 *Rich. Eq. Rep.* 67. Here the husband bequeathed to his wife and her heirs a plantation, slaves and some other property; and also, two thousand dollars to be made of his estate. He then gave all the residue of his property, after the payment of his debts, to his children. The two thousand dollars in money bequeathed to his wife, he intended to be in lieu of a certain debt due him in right of his wife, by virtue of a decree of the Court of Equity. Upon the death of the testator, the wife as survivor became entitled to this decree. The Court of Appeals held that the wife was bound to elect, and that if she accepted the property given to her under the will, she could not retain the decree, giving up the two thousand dollars only.

Chancellor Harper, in delivering his opinion on the first trial of this cause at Edgefield, and which was subsequently concurred in by the whole court, says: "The testator certainly regarded the decree as his own, and that he had power to dispose of it. He speaks of it as his, though in right of his wife. It is plain that he did not intend the wife to have it."

With these preliminary remarks and illustrations, we will proceed to examine the several points presented by the transcript of the record and bill of exceptions.

1st. The court below charged the jury, that they should inquire and determine whether from the whole will, the testator intended that the defendant should take \$500, or the boy, and not both. How could the testator have intended John McGinnis to take *Booter*, when he wills him expressly to his two other sons, James and Stephen? It is an inference of equity, that he could not so have intended. The very case before us is that put by Judge Lomax in his treatise on executors and administrators, as an example of a constructive election, as if a testator should give an estate belonging to his son to a third person, and should in the

same will bequeath to the former a pecuniary legacy; here it is obvious that it was *not intended* that the son should take both, to the exclusion of the other devisee; and he will therefore be put to his election which he will take.—2 *Lomax Ex. and Ad.* 164. It was error therefore to submit that as matter of fact, to be found by the jury, which was an implication of law from the face of the testament.

The truth is, that where a testator gives to a legatee the property of a third person, *believing it to be his own*, as was probably the case in this instance, and at the same time bequeaths a pecuniary benefit to the *owner*, the testator himself can never, in the very nature of things, *intend* to put the party to his election; and the modern doctrine is, that it is sufficient to raise a case of election, that the testator *does* dispose of property which is *not his own*; nor is any inquiry necessary whether he did so, knowing it not to be his own; or whether he did so under the erroneous impression that it was his own; *and the court will not speculate on it.*—1 *Swanst.* 407, *note*. To put the legatee to his election, it is only necessary that the instrument should clearly ascertain the property given; that it was manifestly the intention of the testator to dispose of the property which is not his own; and that the gifts are in such terms as are inconsistent with the notion, that the donee can keep his own estate, and also take under the will, without defeating the intention of the testator. It is, in other words, in the nature of a condition, and that condition is implied from the nature of the several dispositions.—Chief Justice Ruffin, in *Wilson vs. Arny*, 1 *Dev. and Bat.* 378. Is not the boy *Booker* clearly designated in the will? Can there be a reasonable doubt, that it was the intention of James McGinnis, senior, to dispose of him? The defendant in error admits it, and insists *only* that he is not *specifically* bequeathed, but *falls into the residuum*; and are not the gifts of *Booker* to James and Stephen McGinnis, and of the legacy of \$500 to John McGinnis, in such terms as are utterly inconsistent with the notion, that John McGinnis can, without contravening the purpose of the testator, hold *Booker* by virtue of his independent title, successfully asserted in the action of trover, and also claim the \$500, the payment of which is charged upon *Booker*, and the other property embraced in the 5th clause of the will?

The foundation of the doctrine of election is, *the intention of the author of the instrument*; an intention which extending to the whole instrument is frustrated by the failure of any part.—2 *Story's Eq. Jur.* 337. We are of the opinion, then, that the title set up to *Booker* by John McGinnis, and the claim to the pecuniary legacy of \$500, are inconsistent with each other; and that he has his choice between them, but that he cannot take both, and so the court below should have instructed the jury.

2d and 3d. The second and third ground of alleged error may be considered together. The judge who tried the cause, charged the jury, that the doctrine of election applied only to *specific* and not to *residuary* legacies; and that they should decide, from a consideration of the whole will, whether the complainants were the one or the other. That if they found them to be *residuary* legatees, then they had no right to call on the defendant to make his election, and that consequently they would in that event find for the defendant.

Now, the general principle is correctly stated, that the doctrine of election cannot be raised in favor of *residuary* legatees, for the simple

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that money on hand at the testator's death passed under it; that this enumeration under a *videlicet* was only a defective enumeration, and not a restriction to the specific articles; that they were rather words of enlargement, the object being to exclude nothing. So, here, in a subsequent part of the same *sixth* clause, the testator bequeaths all the balance of his property, consisting of live stock, working tools, books, notes, accounts, ready-money, and all other property of which he may die possessed. Here it is manifest that the testator intended to include everything which he had to dispose of, and that the specification was intended to enlarge, and not to restrict, the words previously used. We do not perceive, therefore, the advantage to be derived to the defendant in error from this authority. Instead of naming *Booker* and the other slaves, if the testator had included him under words like these: "All the balance of my property, consisting of negroes," &c. But such, unfortunately for the party, is not the fact. *Booker* is bequeathed, *eo nomine*, by that name. And the only inquiry is, Was it the intention of the testator to give him to James and Stephen McGinnis, and would that design be defeated unless John is put to his election?

But I assume still higher ground, and hold, unhesitatingly, that if the will had been so framed as that *Booker* constituted clearly a portion of the *residuum*, still, if it was apparent from the instrument itself that he was intended to be given to James and Stephen McGinnis, equity would compel John McGinnis to elect between these alternate rights; for, in such a case, the reason of the law ceasing *why* residuary legatees cannot claim the benefit of this doctrine, the law itself would cease to apply. Nay, the courts in South Carolina have gone much further, and the case already referred to, in *Richardson*, says: "If the testator had declared expressly that the decree now claimed by the wife, as survivor, *should form part of his estate, whether to pass under the residuary clause of the will, or to be distributed as property intestate, it is plain that the widow could not have taken her legacy and decree both, without defeating the provisions of the will, and she must have selected.*"

But it is argued, that the testator had a present interest in *Booker*, (the possession,) the devising of which to James and Stephen McGinnis was not inconsistent with the paramount title of John McGinnis. It is true that the doctrine of election has been held not applicable to cases where the testator has some present interest in the estate disposed of by him, although it is not entirely his own. In such a case, unless there is an intention clearly manifested in the will to dispose of the whole estate, including the interests of third persons, he will be presumed to intend to dispose of what he might lawfully dispose, and no more.—2 *Story Eq. Jur.* 352. There is an insuperable difficulty, however, in the present case. His *possessory* right, such as it was, terminated at his death; and John McGinnis, in the action of trover, recovered hire from that time. But the *legacy* of *Booker* did not take effect till *after* the death of the testator. No presumption or implication could arise, therefore, under these circumstances, that he intended to dispose of that which could not exist—a *nonentity*. The question, it will be borne in mind, is one of *intention*. Suppose that the testator had a life estate in *Booker*. *That could not survive him*; and he could not be supposed to be disposing of that by his will. The inference would have been otherwise, had it been

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shown that he possessed an estate in this slave, during the life of his wife, or of some other person. He might then have intended to bequeath only that present interest, without interfering with the remainder in fee in his son, John McGinnis. There was no such testimony adduced; and such, we imagine, is not true in point of fact.

On the contrary, the presumption is, that the testator supposed that *Booker* was absolutely his property, and that he was willing to make over to his sons, Stephen and James, the entire estate in him. At the commencement of the sixth clause, he undertakes to dispose of all the residue of his property, *Booker* included. Still further on, he calls him his slave, and classes him with the other negroes that are admitted to be his; and charges the whole with the payment of his debts, legacies, and funeral expenses.

An argument is invoked from the first clause of the will, to show that the testator did not intend to put John to his election. The property left to his wife is given expressly *in lieu of her dower*, demonstrating that the testator's mind was called to the contemplation of this subject; and yet he prescribed no such condition in the legacy to John. The answer is at hand. He knew that the right to dower vested in his wife; it was an estate vouchsafed to her by law. He could, therefore, and did, make provision against it, by offering a substitute for it. Believing, however, that the title to *Booker* was in him, and that he had the same power as will him, that he had the \$500 bequeathed to John, it could not have entered his mind to have presented any such alternative. And in this and the like case, equity, by a *strong operation*, in the language of the books, interposes, and forces the recusant legatee to a choice between these inconsistent rights.

4th and 5th. But the court below charged the jury, that if they found for the complainants in the bill, upon the points already discussed, still they come forward too late; that they had no right to resist the title of the defendant to the utmost to *Booker*, and force him to expend large sums of money in prosecuting his claim, to take the benefit of the chances of litigation in the action of trover, and failing there, to seek now to put the defendant to his election, and that they were not entitled to recover back the money already paid to the defendant towards his legacy, at least so much of it as was advanced before the action of trover was brought. And in support of this position, counsel have relied with much confidence on the case of *McDowall vs. McDowall*, 1 *Bail. Eq. Rep.* 324.

From a review of that authority, I am satisfied that it does not afford any support to the principle contended for. That was a bill filed by the children of William McDowall, and residuary devisees and legatees, under the will of their grandfather, John McDowall, deceased, against Mary McDowall and Alexander Black, as executrix and executor of the testator, for an account of his estate. John McDowall, the grandfather, by his will, dated in 1819, had bequeathed to his wife, the defendant, Mrs. Mary McDowall, his household furniture, plate, and carriage and horses, with the privilege of living five years, rent and tax free, in the house behind house No. 194 King-street, and also an annuity of five hundred dollars, payable quarterly, out of his estate, with the use of the Tom, and washerwoman, Mealy, during her life only, and as her

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death the said slaves to be set free by their mistress. And the will adds, "This settlement on my good wife, I hope she will consider a full compensation for any right of dower on my estate, as *I fully do*." In a codicil, the testator speaks of the surplus of his estate, after paying all gifts and his wife's dower of \$500 per annum. The testator appointed the defendants, Mrs. McDowall and Alexander Black, executrix and executor of his will. Mrs. McDowall, in her answer, admitted that she had received the annuity of \$500 from the estate, and that the furniture and plate were delivered to her, not amounting in value to more than \$500; that she received but one of the carriage horses, the other having died; that she received the negro woman, Mealy, the man, Tom, having been sold by the testator in his lifetime; and that she had the use of the house for the five years directed by the will. Both of the defendants qualified, but Mr. Black acted, principally, in the execution of the will, and delivered the property bequeathed, and made the payment of the annuity to his co-executrix.

In 1824 Mrs. McDowall sued out a summons in dower against the executor, Mr. Black, in the Court of Common Pleas for Charleston district. This was pending until June, 1826, when the following order appears on the Minutes of the court: "Mrs. McDowall's claim of dower—clause in testator's will—after hearing the attorney-general for the motion for a writ of admeasurement of dower, and King *contra*, ordered that the writ do issue." The writ issued accordingly, and the dower was assessed by the commissioners at six thousand five hundred and sixty dollars, for which judgment was entered, and the amount paid by the executor, Mr. Black, out of the funds of the estate.

The present bill was against the executrix, and executor, for an account of the estate; and the only question submitted, preparatory to taking the account was, whether the widow, Mrs. McDowall, is entitled to retain both the bequests to her contained in her late husband's will, and the amount recovered by her as dower; whether the bequests to her were not intended in satisfaction of her dower; and whether she is not bound to elect, and, indeed, whether she has not already elected, by accepting the provision made for her by the will, in the first instance.

The chancellor held, and his opinion was sustained by the Court of Appeals: That if the question was properly before him, whether, on the face of the will, this bequest was intended as satisfaction of dower, that he would have no hesitation in saying that it does appear to have been so intended—*expressly so*. But he felt himself bound to consider this as a matter already adjudicated by the court of law. And that having been once adjudicated by a court of competent jurisdiction, it should not again be drawn in question. That this defence appearing on the face of the will itself, might have been made in the suit for dower; yea, it was actually offered, and considered, and the very point now presented decided on; and that he had no authority to review that decision, however clearly it may have seemed to him to have been erroneous, and notwithstanding it may have been a matter of concurrent jurisdiction in the first instance.

"It is said," continues the chancellor, "that to compel an election appertains exclusively to chancery jurisdiction." There is no doubt of that; and in order to exercise that jurisdiction, the court determine

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the questions which arise on the construction of wills, whether a devise or bequest was intended in satisfaction. But when the question of construction has been settled by a competent authority, and the provision actually accepted, decided not to be a bar to the demand; what foundation is there for the exercise of the jurisdiction of this court? It would amount to this: A court of law, in the proper exercise of its jurisdiction, determines that a party is entitled both to a legacy and dower; and that the acceptance of one, on a just construction of the will, is no bar to a demand for the other. But in a case where the party is entitled to but one of the provisions, it belongs only to this court to compel the party to elect; and, in order to clear the way to an exercise of this jurisdiction, it may set aside the judgment of a tribunal of equal authority.

Now, the striking difference between this case and the one under consideration is this: In the case in Carolina, the defence to the suit for dower was apparent on the face of the will, which made provision for Mrs. McDowall, the demandant. Where that is the case it is a good plea at law. And if the matter has been once adjudicated, or if the parties had an opportunity of litigation and failed to do so, they will not be heard before another tribunal. If the testator, James McGinnis, Senior, knowing *Booker* to belong to his son John, had nevertheless willed him to Stephen and James, and bequeathed to John \$500 expressly in lieu of *Booker*; then had John accepted the \$500, and afterwards undertaken to recover *Booker*, the acceptance and payment of the pecuniary legacy would be a good plea in bar. But this is not the case. Stephen and James allege in their bill, and the fact is not denied, that when they made the first four payments to John, on his legacy, and entered into the agreement, that his sale note should be applied in the same way, they were wholly ignorant of his claim to *Booker*. The gift of the \$500 was no defence to the action of trover. Because it did not purport to be as a substitute for this slave, and the law is that if a testator gives A a benefit by his will, and by the same will disposes of a piece of property belonging to A, at law he would be entitled to both; equity only can compel him to elect.

What, then, was the obvious duty of the executors?

John McGinnis had by his suit set up a title to a negro which they had every reason to believe belonged to their testator, and of almost double the value of the pecuniary legacy left to him. Were they to stand by and fold their arms in silence and submit to a recovery? Fidelity to the estate they represented, to the dying intentions of their testator, forbid it. Nor are they to be punished now for doing that which they would have been forsworn in not doing. No laches is imputable to them for not pleading the gift of the legacy to the action of trover, for it constituted no legal defence; and no blame, for resisting the title of the plaintiff—that obligation having been imposed by their oath of office.

The plaintiffs in error rightfully insist, therefore, that they were bound to put the defendant to his election until the title of *Booker* was ascertained. Nor does the complaint of delay come well from John McGinnis, who conceals from the complainants his intention to claim until they have paid out a good portion of his own, and the

other pecuniary legacies; defrayed the burial expenses of their testator, and satisfied his outstanding debts; looking to this boy in part for the means of doing so. But this is not all; after he has obtained *Booker*, and two hundred and forty dollars for his hire, he sues for the balance of the \$500 legacy, and is proceeding to collect the same of the executors; and yet thinks it iniquitous that he should be called upon to make his election; after he has been forced to expend money in litigating the title to *Booker*; whose recovery too, leaves the disappointed legatee, under the will of his father, *minus* three hundred dollars.

The principle contended for is sound law: that before a legatee can be obliged to make his election, all the necessary accounts should be taken, and the amount that he is entitled to under the will settled and ascertained. And under peculiar circumstances, some of the authorities go so far as to say that *fifty years* is not too long for that purpose.

This will is equally applicable to the other party, seeking to put the legatee to his election, and applies with peculiar force in the present case. Suppose John McGinnis had lain by, just long enough to keep within the statute of limitations, in suing for *Booker*; and, in the mean time—as he might have done—forced the payment of the pecuniary legacy; would he not be decreed in equity, under these circumstances, to make his election? And this is just the case made by the pleadings. The very point decided in *Brown vs. Ricketts*, (3 Johns. Ch. Rep. 553,) was that, where the plaintiff in his bill sets up a claim, independent of the will, to part of the property devised in trust, to pay the legacies, he must elect to waive his claim, or *wait until it be determined*, before he can call for account or payment of any part of his legacy; that the question of election does not, and cannot, arise, until the title to the disputed property be settled.

The case of ——— vs. *Giddings*, (3 Con. Eng. Cas. in Chan. 383,) is a sufficient reply to the intimation, that John McGinnis had elected to take the \$500. It shows that where the legatee, as in this case, takes both estates—possessing himself of that which is his own, and receiving also that given to him by the will—he cannot be said to have relinquished either, but elected rather to take both.

The only remaining point necessary to notice is, the opinion expressed in the conclusion of the charge: that even if the defendant is put to his election, he cannot be compelled to refund the money which has already been paid him on his legacy. The case of *Wake vs. Wake* (1 Ves. Jun. 335) is directly at war with this idea. The testator bequeathed to his wife £100, to be paid out of his personal estate, within six months after his death, and after some particular dispositions, gave all his estate and effects whatsoever, subject to an annuity of £35, to his wife for life, in trust for his son, by a former wife, whom he made residuary legatee. The widow received her legacy, and also the annuity, for three years, and then brought the bill claiming both her interest under the will and her dower, which was about £80 a year. The trustees had let the son into possession at twenty-one, according to the directions of the will. The court being of the opinion that the widow ought to elect; the question was, whether, by receipt of the legacy, and of the annuity, for three years, she had not made her election to abide by the will. But Buller, Judge, for Lord Thurlow, Chancellor, thought

otherwise, observing: "If the argument for the defendant holds, a single payment would have bound her; but the point is, whether she had a full knowledge of the circumstances of the testator, and of her own rights. I think there was a case before me about two years ago, at Lincoln's Inn Hall, which went much beyond this. If she had acted with full knowledge, she should not afterwards deny it; but after three years only, I cannot say she is not entitled. The legacy of £100, and what she had received from the annuity, must be accounted for."

So in the case of *Wilson vs. Army*, already quoted; it appearing there that the legatee, who was forced to elect, had been in possession of both plantation and lot since the death of the testator; he was decreed to account for the rents and profits since that period of the parcel he may surrender; which account the master in chancery was directed to take as soon as the legatee declared his election.

The books abound with similar precedents; but I do not deem it profitable to pursue this investigation further.

Had the estate of James McGinnis, senior, consisted of the boy, *Booker*, and \$500 in money only, and he had died, making the same bequests, and John had subsequently sued for and recovered *Booker*, and then sought to retain the sums already paid him, and to collect the residue of the \$500, the flagrant impropriety of the proceeding would have been manifest to all. And yet in principle there would have been no difference.

The bulk of the estate is given apparently to a few favorite children. But they take it *cum onere*, and, whether, after the payment of debts, legacies, funeral expenses, and the costs of administration, they will be gainers or losers, the record does not disclose.

The learning of the judge who tried the cause, and the verdict of the jury, all bear testimony to the struggles of a strong sense of natural justice, against the supposed wrong inflicted by the will. But with this we have nothing to do. By the laws of the land a man has the right (*I wish it were otherwise*) to dispose of his property by will, even to the entire disherison of his wife and children. And, so long as this power is preserved, the only inquiry with courts must be, not what the testator ought to have done, but what he has done, with his estate? And courts and juries are just as much bound to execute that will, if it be not against law, as they are the constitution of the United States, or the constitution and statutes of the State of Georgia.

For these reasons the judgment below must be reversed.

No. 73.—WILLIAM E. MILLS, JONAS KING, and AMBROSE MILLS, plaintiffs in error, vs. JOHN H. LUMPKIN, administrator of THOMAS MILLS, deceased, defendant in error.

A debt which accrued in the lifetime of the testator or intestate, cannot be set off against a debt which accrues to the executor or administrator, after the death of the testator or intestate.

With regard to sets-off, courts of equity follow the law, unless where some *peculiar equities* intervene between the parties.

When a party comes into a court of equity to ask its assistance, to interfere with the legal administration of the assets in the hands of the executor or administrator, he should at least state a clear *prima facie* case, on his part, to justify such interference.

The plaintiffs in error filed a bill against the defendant in error, and Houston Aycock, sheriff of the county of Floyd, praying an injunction, which was sanctioned. The bill was made returnable to the April Term, 1846, of the Superior Court of said county of Floyd, and charged that the complainants were the only heirs at law of said intestate, the said Ambrose being his father, the said William E. his brother, and the said Jonas his brother-in-law; that upon his death, his estate, of the value of \$20,000, or other large sum, went into the hands of the defendant in error, as administrator; that the complainant, William E., purchased, at the administrator's sale of said estate, town property in Rome in said county, at and for the sum of \$784, and the complainants executed to said administrator their joint and several note therefor, nothing doubting but that the said estate, of which they were heirs and distributees, was fully solvent, and that one of the complainants, the said Ambrose, was a creditor of the said intestate to the amount of four thousand dollars, or near that sum, and had filed his bill against said administrator for account and payment of his said demand, commonly called a creditor's bill, and in which other creditors of said intestate had joined as complainants, and which was still pending; that said administrator had, of said estate in his hands, a much larger amount than the sum specified in said note, and which larger amount was due to the complainants, or one of them, from said administrator, and ought to be applied in payment of said promissory note, so far as the amount thereof, and the balance paid to the complainants; notwithstanding all which, the said administrator commenced action against them on said note, returnable to April Term, 1844, of Floyd Superior Court, during the pendency of the creditor's bill aforesaid, and having perfected service upon one of the complainants, Jonas King, at the October Term thereafter, procured him to confess judgment, which confession was, by mistake, entered for \$884 75, principal, besides interest and costs of suit, and judgment was rendered and signed accordingly, and which was between one and two hundred dollars more than was due upon the note.

That the defendant sued out an attachment against the complainants, or one of them, founded upon said note which was pending on appeal, and that judgment would be obtained thereon, unless restrained by the

timely interposition of the court. They expressly charged that they, or some of them, were entitled in equity to receive from the administrator a much larger sum of money than the amount of said note—their claim amounting to \$4,000, aforesaid, or other sum—and which amount was, or ought to have been, in the hands of the administrator, and out of which they were willing, and offered by the bill, to pay said note; that they were advised, and believed, and therefore expressly stated and charged, that the administrator was mismanaging said estate; had paid off some favored pretended creditors their full demands, and was proceeding in equity to marshal the assets, under pretence that the estate would be unable to pay the debts due and owing thereby; that the said administrator was and had been making all the efforts in his power to defeat the just claims of the complainants, and particularly that of the complainant, Ambrose Mills, whose claims, as aforesaid, exceeded the sum of \$4,000, or some such large amount, consisting of bonds or notes under seal; and that if the complainants were compelled to pay said administrator the amount sought by him to be collected upon said note, they charged, “that it was their belief, founded upon their knowledge of the conduct of said administrator, in regard to said estate, and particularly to the claims of said Ambrose Mills, as well as from information which they believed to be true, that they would not be able to recover the same again from the said administrator, and that the same would be wholly and entirely lost.” That one of the complainants, Jonas King, was the only security of said administrator on the administration bond given by him for the due administration of said estate; “and they had good cause to apprehend, that if the money so sought to be collected from them, should go into the hands of said administrator, it would be so managed as to render the complainant liable therefor upon his said bond.” The bill concluded with a prayer for injunction to enjoin the administrator from proceeding on said judgment and attachment; also for the correction of the confession of judgment, so as to make it for the proper amount, and to perpetually enjoin its collection, and for a full and fair account and settlement with the complainants, and especially with the said Ambrose, and for further relief, &c.

The administrator answered the bill, negating the alleged equity, and gave notice to the complainants’ solicitors of motion for rule *nisi* to show cause why the injunction should not be dissolved upon the coming in of the answer.

On the 17th day of July, 1846, the motion to dissolve the injunction came on to be heard before Judge Wright, in chambers, when, after argument and consideration of the question, the judge below made the following decision, dissolving the injunction upon the case made by the bill and answer: “Upon the hearing of the motion to dissolve the aforesaid injunction, it is ordered by the court, that said injunction be dissolved, upon the ground that the complainant has failed to pay up the sum admitted to be due upon the *fi. fa.* mentioned, and still does neglect and refuse to pay the same.” To which the counsel for the plaintiffs in error excepted, and assigned for error in said decision, that it was erroneous in law to dissolve the injunction on the ground that the complainants had not paid the sum of money due on the *fi. fa.* mentioned in the bill, and still to pay it; because one of the complainants was a specialty credi-

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tor of the estate, and the complainants' heirs at law of the intestate, and the only distributees of said estate; and the object of the bill being to restrain the collection of the *fi. fa.* mentioned, and no order requiring the money to be paid; and if it was right and proper to grant the injunction at first, it ought to have been retained till the final hearing of the cause.

JOHN W. H. UNDERWOOD, for the plaintiff in error,

Insisted that the decision of the Chancellor in the court below was erroneous, in dissolving the injunction, because it was proper at first to grant it, and the answer did not make such a case as required its dissolution; and cited 2 *Story Eq.* 138, 139, sec. 840, 841, 842; also, 1 *Story Eq.* page 745; 3 *Meriv.* 29, 38:

WILLIAM MARTIN and HOWELL COBB, for the defendant in error.

LUMPKIN, Judge, gave no opinion in this case, the defendant in error being a relative.

By the Court—WARNER, Judge.

This was a bill of injunction, filed at the instance of the complainants, to restrain the defendant as administrator from collecting and reducing to possession the assets of his intestate, in the due course of administration, on the ground, one of the complainants held a much larger claim against the intestate, than the one which the administrator is attempting to enforce against them.

The claim which the administrator is endeavoring to collect out of the complainants, is for property sold by him since his intestate's death, and is founded on a note made payable to the administrator himself. The complainants seek to set-off, or discount so much of their claim, as will extinguish the demand of the administrator against them; and to perpetually enjoin him from collecting the same.

The complainant's demand being due from the intestate in his lifetime, and the demand against the complainants which the administrator is enforcing, having been created and made payable to the administrator himself, since the death of the intestate, could not at law be set off against the claim of the latter. "A debt which accrued in the lifetime of the testator, cannot be set off against a debt which accrues to the executor, after the death of the testator."—1 *Leigh's Nisi Prius*, 156, and cases there cited. *Kittrington vs. Stevenson*, *Willes' Rep.* 264; 2 *Williams on Ex'rs*, 1155. With regard to sets-off, courts of equity follow the law, unless some *special circumstances* occur to justify an interposition, as where *peculiar equities* intervene between the parties.—2 *Story's Eq.* 663-4, section 1437.

Does the case made by the complainant's bill exhibit such special circumstances or peculiar equities between the parties, as will authorize the interference of a court of equity, to restrain the administrator in the due administration of the assets of his intestate? We think not, and are of the opinion it ought never to have received the sanction of the chancellor. It is true, the complainants charge it is their *belief*, founded upon the *conduct* of the administrator, as well as from *information* which they believe to be true, that they will not be able to recover their claim from the administrator and that it will be entirely lost. The complainants now

state the *reasons or grounds of their belief*; nor do they state in what *particular manner* the administrator has conducted himself; nor do they pretend to state what *particular information* they have received, which enables them to arrive at the conclusion, they will not be able to recover their claim from the administrator. The *grounds* of their belief, the *particular conduct* of the administrator, as well as the *nature and extent* of the information received by them, would be very important in order that the court might be enabled to judge of their *sufficiency*. Besides, it would be very difficult for the defendant to form an *issue* with the complainants upon their general allegations, and still more so to negative them by *proof*.

The complainants further allege that Jonas King is the only security to the administration bond of the administrator, and if the money sought to be collected shall go into his hands, they have *good cause* to apprehend it will be *so managed* as to render King liable therefor on his bond. What *acts* of the administrator have given the complainants "*good cause*" of apprehension, we are not informed, nor do we exactly know what they desire us to understand by the term "*so managed*," as applicable to the *official* conduct of the administrator.

It is charged, the administrator has paid debts out of their legal order; if so, he and his securities are responsible: and it is nowhere alleged the administrator or his securities are *insolvent*. The mistake in the confession of judgment could have been amended, and corrected by the court in which the same was made.—*Bank of Pennsylvania vs. Condy*, 1 *Hill's S. C. Rep.* 209, and cases there cited.

When a complainant comes into a court of equity, to ask its assistance to interfere with the legal administration of the assets in the hands of an executor or administrator, he should at least state a clear, *prima facie* case on his part, to justify such an interference. Had the complainants shown such a case by their bill, as would have authorized the interference of a court of equity, we are of the opinion it is not one of those cases which would have required the payment of the money into court under the rule of practice established by the Superior Courts.

We affirm the decision of the court below dissolving the injunction, on the ground alone, it does not appear upon the face of the complainant's bill, that there is sufficient equity to authorize a continuance of the injunction.

No. 74.—OLDER NEAL, plaintiff in error, vs. GREEN B. HAYGOOD, administrator of JAMES HENDON, deceased, defendant in error.

At common law, the action of debt against a sheriff, for an escape out of final process, does not survive against his representative.
Under the statutes of Georgia such an action does survive.

This case was tried before Judge Dougherty, in the Superior Court of the county of Clark, at the August Term, 1846.

For the facts of the case, and the error assigned, the reader is referred to opinion delivered by the Supreme Court.

Neal vs. Haygood, Administrator.

H. & T. R. R. COAN, for the plaintiff in error.

JUNIUS HILLYER and GREEN B. HAYGOOD, for the defendant in error.

Insisted that the action of debt against the sheriff, for an escape, does not survive against the representative.

1st. Because it is a personal action which dies with the person.—1 *Chit. Plead.* 102.

2d. Because the action, though in form *ex contractu*, is in fact founded upon a *tort*, viz: the negligence of the sheriff, or jailor, in permitting the escape.—*Dyer*, 271, 322; 1 *Saund.* 216, note 1; 2 *Wms. on Ex'ors*, 1239. When the act complained of is beneficial to the sheriff, or his estate, his assets ought to be answerable, and his executor therefor be charged.—*Humbly vs. Trott*, *Cowp.* 214, 371; *Toller on Ex'ors*, 460-462; *Franklin vs. Lowe*, *Adm'or*, 1 *Johns. Rep.* 396-402; *Martin vs. Brady*, 1 *Caines' Rep.* 124.

3d. Our statute, which requires the sheriff to give bond, only designs to secure to the parties in interest those rights to which they were entitled at law.

By the Court.—NISBET, Judge.

This was an action of debt, brought in the lifetime of James Hendon, late sheriff of Clarke county, by a plaintiff in execution, for an escape out of final process. The defendant in execution had been committed on a *ca. sa.* Pending the action the sheriff died, and *scire facias* having issued to make his representative a party; upon return thereof, Green B. Haygood, Esq., the administrator, objected, upon the ground that the action for an escape, being a personal action, abated upon the death of the sheriff. The judge presiding sustained the objection, and it is upon that decision that the plaintiff in error brings his writ.

In England, all actions at common law, in favor of a sole plaintiff against a sole defendant abated. The survivorship of actions is given by statute. The general rule, as to personal actions, is expressed in the maxim, "*actio personalis, moritur cum persona*," actions on contracts, expressed or implied, survive. This legal maxim is considered as applying to actions in form, *ex delicto*, exclusively. Notwithstanding, all actions founded in *tort* do not abate. This doctrine, in England, has undergone considerable modification from its early universality; and it is not a very easy matter to determine, with precision, what actions do abate, according to the common law. By our statute, if the *cause* of action will survive in the same or any other form, the action does not abate. So we are relieved from the consideration of the subject of abatement, so far as regards the *form* of actions.

The doctrine of abatement was discussed by Lord Mansfield, in the case of *Humbly vs. Trott*, in *Cowp.* 373; and the opinions expressed in that case have ruled the decisions of the British and American courts from that day to this—not universally, but very generally. One finds it difficult, notwithstanding the precision and perspicuity of Lord Mansfield's opinions, to deduce from the case in *Cowper* any rule which will satisfactorily embrace all causes of action in *tort* which will abate, and exclude all which will survive. He says: "Where the cause of action is a *tort*, or arises, *ex delicto*, supposed to be by force and against the king's peace, then the action dies; as battery, false imprisonment, trespass, *wor' &c.*, escape against the sheriff, and many others of the same kind."

test first applied to determine whether actions abated or not, was the general issue, and it was held that in all cases where the general issue was *not guilty*, the action abated. This rule embraced too much, and was confessedly without reason. Its absurdity was manifest in the very case in which it was announced; that was an action of *trover* against the representative for a conversion in the life of the intestate, and was dismissed because the plea of the general issue was *not guilty*. The rule, however, was enlarged in the case of *Hambly vs. Trott*, Lord Mansfield declaring: that in cases of *tort*, where the tortfeasor has injured another, without thereby benefiting his own estate, the action did not survive. It is upon this last distinction that, we are informed, the case at bar was determined not to survive. The weight of authority, we admit, sustains the rule as above stated; but, with great respect for the courts and the men who have established it, we are constrained to say that it is not well-founded in principle. The two rules before herein adverted to, are, in our view, purely technical and arbitrary. We see no reason, in fact, why all causes of action, *ex delicto*, as well as *ex contractu*, should not survive. The law gives to a citizen, for an injury to his character, remuneration in money, because there is no way but this to remunerate him; and, should the slanderer die, the right and the remedy ceases. Upon principle, we see no reason why one who has been injured by the violence, or slander, or malfeasance, or omissions of another, should be deprived of redress, because the wrong-doer happens to die before he can get it. The rights of men in a society, eminently civilized and enlightened as ours is, should not depend upon the form of a plea. And why should the right to redress depend upon the question whether the estate of the tortfeasor has been benefited? It ought to depend, as we believe, alone on the fact of *injury* to the complaining party. The common-law scarcely, in this particular, deserves the encomium of its great commentator: "the perfection of human reason." And such is the judgment of the British Parliament, for by *Statute 3 and 4, Will. 4*, trespass and case will lie against personal representatives for any wrong committed by any person, deceased, in his lifetime, to another, in respect of his property, personal or real, so as such injury shall have been committed within six calendar months before such person's death. So much for the general subject of abatement, and in relation to which see 1 *Coup.* 373; *Broom's Legal Maxims*, 400, 407; 4 *B. and Ad.* 829; 10 *B. and C.* 299, 308; 2 *Durif. and East*, 126; *Toller Ex'ors*, 460; 1 *Johns. Rep.* 396, 402; 1 *Caines' Rep.* 124.

In enumerating causes of action that do not survive, as we have already seen, Lord Mansfield mentions *escape against a sheriff*. It is because *escape* is found in that enumeration, that the action for *escape* has been determined in the majority of cases to abate; the later cases all having reference to this early authority. At common law, debt did not lie for an *escape*, and the remedy was by action on the case, in which the recovery was according to the quantum of injury sustained. By statute, in England, debt lies for an *escape* out of final process. An important distinction obtains between an *escape* out of *mesne* and final process. For the case is the appropriate remedy, and the sheriff is liable for the debt according to the injury proveable; for the latter debt is the appropriate, and the sheriff, taking the place of the defendant, is liable.

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for the whole debt with costs.—2 *Inst.* 382; 2 *T. R.* 132; 2 *Strange*, 827; 2 *H. Blk.* 108; 1 *Saund. Plead. and Evid.* 484; 1 *Wheat: Sehr.* 614 a 616.

We must believe that Lord Mansfield, by escape against the sheriff, meant escape upon *mesne* process. The reasons of this belief are as follows: In *Hambly vs. Trott*, he says, that all causes of action, originating in contract, express or implied, survive. If the sheriff, upon escape out of final process, is liable for the debt, (and of this there is no manner of doubt,) I cannot perceive how it is, that this obligation to pay is not a contract implied *virtute officii*.

One of the duties of the sheriff is, safely to keep the body of the defendant committed under a *ca. sa.* The process commits him until the debt is paid, or he is discharged under our insolvent laws: the commitment is the plaintiff's satisfaction. At common law, a discharge after arrest extinguishes the debt. The sheriff undertakes, as the agent of the law, to retain for him the plaintiff's satisfaction, against all things but the act of God and the king's enemies. The inference of law, therefore, in case of escape is, that the sheriff, instead of the body of the prisoner, has got the money due on the judgment. Under these views it is that he becomes himself the debtor. Do not the duties of his office, his voluntary acceptance of it, the liquidation of the plaintiff's debt, and the terms and conditions of the commitment, create a contract by implication of law; and, if so, then Lord Mansfield, by his own judgment, in *Hambly vs. Trott*, is demonstrated to have meant an escape on *mesne* process. The fact, that an escape from execution is the contingency upon which a sheriff becomes liable, upon the contract implied by the tenure of his office, is not left to be deduced from reason—it is established upon authority.

Blackstone holds the following language: "The last class of contracts implied by reason and construction of law, arises upon this supposition, that every person who undertakes an office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence and skill. And if, by his want of either of those qualities, any injury accrues to individuals, they have therefor their remedy in damages, by a special action on the case.

"If a sheriff, or jailor, suffers a prisoner, who is taken on *mesne* process, to escape, he is liable to an action on the case. But if, after judgment, a jailor or sheriff permits a debtor to escape, who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compellable by action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand."—3 *Black.* 164; *Moore*, 431; *Cro. Eliz.* 625; *Inst.* 382.

Whilst, therefore, we are constrained to admit, with the able judge who presided in this case, that at common law, according to the weight of authority, the action of debt for escape out of final process, does not survive against the representative of the sheriff, yet we dissent from the wisdom and reasonableness of the rule.

By the judiciary act of 1799, it is declared that no suit, in any of said courts, shall abate by the death of either party, when such cause of action would, in any case, survive to the executor or administrator, whether such cause of action would survive in the same or any other form; but the

same shall proceed, as if such testator, or intestate, had not died."—*Prince*, 422.

Under this statute, it is conceded, by the learned counsel for the defendant, that if an action can be sustained against the representative of the sheriff on his bond, for the escape, his representative may be made a party to this suit by *scire facias*.

Under the statutes of Georgia, are the representatives of a deceased sheriff liable for an escape out of final process? Does the cause of action survive? We think it does. Sheriffs in England, because of the dignity of the office, and because, too, its functions are, to some extent, judicial, are not required to give bond. This question, for this reason, could not arise there, precisely in the form in which it has arisen here. By statute, in this State, the sheriff is required to give bond and security for the faithful performance of the duties of his office. The law requires that he make, with the public, a covenant, guaranteed by competent security, that he will save all persons harmless, by reason of his default.—*Prince*, 430.

In his bond he acknowledges himself bound to the governor of the State in a stipulated sum, from the payment of which he is acquitted by the faithful execution of his trust. And this bond may be sued by any one aggrieved by its breach. One of the duties of his office is safely to keep the body of a debtor committed under execution; and, if such debtor escape, one of the obligations which the law imposes upon him is to pay the debt. Now, is not a failure to keep the body of the debtor a breach of the bond?—a violation of his covenant? And is not his representative liable, as he would be upon any other covenant broken in his life? Must not his estate, as well as himself, abide his contract? We find it hard to entertain a doubt about it. All contracts and covenants express, survive. We know of no exception. The authorities are clear and uniform to this point.—1 *M. and W.* 423; 10 *A. and E.* 446; *Bacon's Abr. Ex'ors and Adm'ors* (p. 11), *Com. Dig. Administration*, (p. 14); 2 *Lomax*, 258, 264-5; *Dyer*, 14; 2 *Mad.* 269; 1 *Rich.* 310; 2 *Brockenbrough*, 316.

The argument relied upon at this bar for the defendant is, that the bond creates no new rights or obligations, and is only designed to secure persons aggrieved from ultimate loss, in the event of the sheriff's insolvency. It is true that the bond creates no new duties, but if it be conceded that, at common law, a party injured cannot pursue his redress against the representatives of the sheriff, new rights are clearly given to such party. The securities are liable for an escape, and their liability is only commensurate with that of their principal. If they are charged, can it be that they are not entitled to indemnity from the estate of their principal. The bond displaces all implication. The law of contracts applies to it. Be the common law, as to escapes, what it may, we are of opinion that the case before us is a cause of action, originating in contract, and survives.

The judgment of the court below must, therefore, be reversed.

No. 75.—WILLIAM W. BERRY *et al.*, plaintiffs in error, vs. JOHN R. MATTHEWS *et al.*, defendants in error.

A sale of stock by a portion of the stockholders to the rest, is not such a sale by the corporation as will make the purchasers liable to the creditors of the company.

For the facts of the case, and the matters of error assigned, the reader is referred to the decision of the Supreme Court.

JOHN R. STANFORD, H. and T. R. R. COBB, W. L. MITCHELL, and B. H. OVERBY, for the plaintiffs in error.

JUNIUS HILLYER, J. W. H. UNDERWOOD, and B. E. HABERSHAM, for the defendants in error.

By the Court—LUMPKIN, Judge.

This was a bill filed by the creditors of the Habersham Iron Works, and Manufacturing Company, and seeking to make the stockholders of that corporation, *individually*, liable for the debts of the complainants, upon four grounds, because—

1st. The act of incorporation was never legally accepted by the company.

2d. That if accepted, the company had forfeited all their rights under it.

3d. That the stockholders had not paid in the amount of stock held by them.

4th. That large dividends had been distributed by the corporation, to the stockholders which ought to have been applied to the payment of the company's debts.

The bill was made returnable to the April term, 1843, of the Superior Court of Habersham county, and at the same term a demurrer was put in by the defendants, containing thirteen grounds, all of which are reducible to *one*, namely, a want of equity. At April term 1844, a decision was made by Judge Hillyer on the demurrer. He held that a formal acceptance of the charter, by a vote of the majority of the stockholders, was not necessary. That any acts which would go to show that the company were acting under their charter, would be sufficient, and that when the charter was granted upon the application of the company, (as in this case,) its acceptance would be presumed from very slight circumstances. He was of the opinion, that from the facts stated in the bill, the charter was accepted by the company.

The complainants assigned *eighteen reasons* in support of the position taken in the bill, that if the charter was accepted, the company had forfeited all its rights under it; upon this point, the same judge ruled, that a charter may be forfeited, and all the franchises granted therein resumed by the State, on account of the illegal conduct of the company. But, that until a judgment of *ouster* was pronounced by a competent tribunal, the charter remains in full force, and any improper conduct on the part of the corporation cannot be visited on the stockholders, further

those who are concerned in such misconduct—consequently he adjudged that the stockholders were not individually liable to the creditors, upon the ground that their rights, under the charter, had been forfeited by the improper conduct of the company.

Upon the third ground, that the stockholders had not paid in the stock held by them, the court held, that they were clearly liable, and were compelled to respond to the creditors, and that the remedy was by a proceeding in Chancery. But the difficulty in the present case was, that this charter was granted to the very persons by name, who are defendants in the bill, and who, it appears, had formed the company previous to their application to the Legislature for a charter; and that while it was true that they were authorized to extend their capital to even \$60,000, they were under no obligation to do so; and it did not appear that the defendants had ever subscribed for stock which was not paid in, indeed, the very reverse is charged, *that no books of subscription ever were opened*. It was suggested that if the bill had charged, that in pursuance of the charter, the company had disposed of such an amount of stock, and that A had purchased so many shares at such a price, and B had bought so many, &c., and that the purchasers had not paid in the respective sums due by them; that they would be decreed, to pay into court for the use of the creditors, *pro rata*, sufficient to pay their respective debts, or the amount of their subscriptions.

As to the fourth ground, that large dividends had been made by the company to the stockholders, which ought to have been applied to the payment of the debts, the court considered it the strongest point in the case, and that if it had been properly stated and insisted on in the bill, the bill would have been sustained; for, that after the insolvency of an incorporated company, the stockholders could no more receive dividends than they could abstract the capital itself; that, in principle, there was no difference.

Upon a careful examination, then, of the whole case made by the complainants, it was *ordered* that the demurrer be sustained, and the bill dismissed, so much of it as seeks to make the defendants liable, upon the ground that their charter had never been accepted, or that they had forfeited their rights and privileges under it; and that the complainants have leave to amend their bill relative to the sale or subscription of stock, and the fraudulent declaration of dividends.

In obedience to this interlocutory order, the following amendment was made:

“And your orators further charge, that, not having access to the books of the company, they cannot say, with absolute certainty, what amount of stock was held and owned by each stockholder; but they believe, and so charge, that the stock of said company divided out, was two hundred shares at one hundred dollars each, making a capital of twenty thousand dollars; and that the same was divided originally, before the act of incorporation was obtained, between the said John R. Matthews, Paul Rossignol and Lewis F. E. Dugas, in the following proportions, or in other number of shares of nearly the same import, viz: to the said John R. Matthews one hundred shares, making the sum of ten thousand dollars, and to each of the others, the said Paul Rossignol and Lewis F. E. Dugas, fifty making the sum of five thousand dollars a piece, which said last

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sums of money make the said capital of twenty thousand dollars. And your orators further charge, that the said John R. Matthews, Paul Rosignol and Lewis F. E. Dugas, paid no money into the coffers of the association then or at any time thereafter, for the stock thus owned and held by them; and before the grant of the charter of incorporation proceeded to sell a portion of said capital stock of twenty thousand dollars to the other defendants, in the following proportion, or in other number of shares of nearly the same import, each share at one hundred dollars, viz: to Mrs. Pauline V. Dugas five shares, Julia Augusta Nimmo one share, John B. Guieu three shares, Richard W. Habersham, Senr., five shares, Eugene D. Cook five shares, John S. Dobbins, Samuel A. Wales and James Brannon, composing the firm of John S. Dobbins, & Co., ten shares; Lewis Alexander Dugas five shares, John Edgar five shares, Leon P. Dugas five shares, Joshua M. Balleu three shares, John Frazer five shares, John W. Wilde five shares, Oliver S. Dobson five shares, Turner H. Trippe five shares, Antoine Picquet five shares, John V. C. Conling five shares, William M. D'Antignac five shares; making in the whole eighty-five shares, sold at one hundred dollars per share, and amounting to the sum of eight thousand, five hundred dollars; and that the said John R., Paul, and Lewis F. E., retained the balance of said stock, amounting to one hundred and fifteen shares, or other large number of shares, making eleven thousand, five hundred dollars, or other large sum of money, and that they have not at any time paid for said stock to said company; and that if any of the other defendants have paid for the stock sold to them as aforesaid, the money paid for the same, was all appropriated by the said John R., Paul, and Lewis F. E., and was never a part of the funds of the company.

"And your orators further charge, that shortly after the formation of the association, as aforesaid, the said defendants applied to the Legislature for an act of incorporation, which was granted them, and that if the division and sale of stock did not take place as already charged in this amendment, before the grant of the charter, the same transpired shortly thereafter, substantially as charged above.

"And your orators further charge, that said company never received, had, owned or possessed any cash capital derived from the sale of stock as aforesaid, as your orators believe, but that the pretended capital of twenty thousand dollars was all fictitious and nominal, except the sum of eight thousand dollars, given for the original iron-works property, as set forth in exhibit A and B of the original bill.

"And your orators further charge, that in the month of December, eighteen hundred and thirty-eight, or about that time, the president and directors of said company made a dividend of two thousand two hundred dollars, or other large sum, which was paid to the defendants in the proportion of shares held by each, as aforesaid; and that, at the time of declaring and paying said dividend, as aforesaid, the said company was indebted for the capital to the stockholders, and to individual creditors, to the amount of thirty-four thousand dollars, or some other large sum of money, and that no such profits had been made by the company, and that had the property and assets of the company been sold, they would not have produced funds sufficient to pay the then debts of the company; and that the said company from its formative

and during its entire existence, was totally insolvent, except that if the said sum of twenty thousand dollars was paid in, they might have been solvent for a few days, and until the said sum of eleven or twelve thousand dollars was paid therefrom, as charged to Matthews, Rossignol, and Dugas."

The defendants' solicitors filed the following exceptions to the foregoing amendment:

- 1st. Because it was not made in the time prescribed.
- 2d. Because not made as required by the order authorizing it.
- 3d. Because the amendment does not charge the *facts* necessary to a decree under the judgment on demurrer.
- 4th. Because the amendment charges the whole features of the proceeding in every important aspect, altering even the character of the parties, and seeking a decree against *all* as corporators, and against *some* of the defendants as individuals.

At April term, 1845, these exceptions were all overruled, except as to the liability of the defendants on the *facts* stated in the amended bill, in relation to the creation and sale of stock, and alleged not to have been paid for. This point was retained for further consideration. Judge Hillyer was succeeded by Judge Dougherty, who, at the April term, 1846, made the following decision upon the point reserved by his predecessor: It cannot in my opinion be insisted on with propriety, that this amendment is within the order of the chancellor; if, for no other reason, because the chancellor had in a former part of his judgment on the demurrer, decided this very point against the complainants. It cannot be presumed that the court consented to an amendment which it had just before, in the same opinion, pronounced bad. I am not entirely satisfied with the amendment, as to the question made in the bill, touching the dividends, which are charged to have been made after the insolvency of the company. Yet I will retain the bill for further hearing on that ground. It is therefore ordered, that complainants' bill be dismissed, except that part which charges, that dividends were declared, and received by the defendants as stockholders, and seeks to make the defendants liable for the same. The bill is retained for a hearing on that ground.

To this opinion, the complainants' counsel excepted, and allege:

1st. That the chancellor erred in dismissing so much of the complainants' bill, as seeks to make the defendants liable for stock created and sold, or distributed to members of said corporation, and which has not been paid for by said company.

2d. That the chancellor erred in holding up for future argument and decision, the liability of the stockholders in said company, upon the charge in said bill, that large sums of money and property had been distributed to stockholders, as dividends of profits, at a time when no such profits had been realized by said company: because, this was not an open question, the same having been previously decided in plaintiffs' favor, upon the demurrer, and upon the exceptions to the amended bill.

I have thus extracted from a most voluminous record, the sum and substance of the questions submitted for our adjudication, together

with the prefatory matter properly applicable to them, and to my mind, they are free from difficulty. The previous judge who presided in the cause, decided upon the demurrer, that the bill was defective as it then stood, but that he would sustain it upon the third ground, as to the sale of stock : *provided it had charged, that in pursuance of the charter, the company had disposed of such an amount of stock, &c.*

Does the amendment contain any such allegation ? We think not. It states that the stock of said company was two hundred shares, at one hundred dollars each ; making a capital of twenty thousand dollars. That the same originally belonged to John R. Matthews, Paul Rossignol, and Lewis F. E. Dugas, and that shortly before, or immediately after, the act of incorporation, *these three individuals* sold eighty-five shares of said stock to the other defendants, who were associated with them in the charter. A sale by these *private stockholders* was evidently not a sale by the *company*, and the liability of the purchasers of stock could not inure to the benefit of the creditors of the corporation.

The truth of this transaction is this, as it appears from the transcript of the record : Jacob Stroup, the former proprietor, conveyed to Matthews, Rossignol, and Dugas, the land on which were located the iron-works, with all the appurtenances appertaining thereto, for the sum of eight thousand dollars. This property constituted the *stock* of the concern, which they valued at twenty thousand dollars. And they induced their colleagues to buy of them eight thousand five hundred dollars worth, at those ruinous rates. And upon this basis, the charter of 1837 was granted, authorizing an extension of the capital to \$600,000. But no other sale of stock was ever made. And the real estate bought of Stroup, with its fixtures and appendages, has been all sold under execution, to satisfy the debts of the company. This is a succinct, and faithful history of this visionary scheme.

It would seem that some of the stockholders or agents of this company, had induced the public to believe that they had a capital of twenty thousand dollars. *actually paid in* ; and by these false representations, succeeded in obtaining a fictitious credit. But this, of course, would subject the persons implicated, to an action at the instance of the parties aggrieved, and could not involve the corporation, or the whole of the stockholders in liability. And this distinguishes this from the recent new theatre case, decided in South Carolina. There, a number of persons in Charleston, associated themselves together, by written articles, to erect a theatre, each promising to pay the amount respectively subscribed for that purpose. They contracted large debts, and afterwards applied to the Legislature for a charter, representing that they possessed a present capital of \$60,000 ; and that fact was recited in the act of incorporation. The company failed. It turned out that only \$37,000 had been paid in ; and the court very properly held, that in a proceeding instituted by the creditors, the stockholders should be decreed to contribute ratably to make up the sum of \$60,000, to pay the outstanding debts, contracted upon the faith of the foregoing false and fraudulent representation. But this is not the case made either by the original or the amended bill.

The judgment, therefore, of the court below upon this ground in the assignment of errors, must be affirmed.

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Nor can we perceive that the Circuit Court erred in holding up the other point, as to the payment of dividends, for further hearing. It is solemnly averred by the counsel of defendants in error, that the meaning of the judge was, *for future trial before the jury*; and that he was so understood at the time by the opposite party. Be that as it may, and not doubting that this was no longer an open question, having been passed upon by Judge Hillyer, in his judgment on the demurrer and exceptions to the amendment, still, a becoming delicacy toward the learned functionary, who, for sufficient reasons, saw fit to suspend for the present his decision upon this point, would restrain this court from interfering. He may, and we are bound to suppose will, determine that it is *res adjudicata*; and he may well insist on the benefit of the maxim, *spectemur agendo*: let us be examined by *our conduct*; tried by *our actions*; and not by what we do not do.

Judgment affirmed.

No. 76.—JOHN DOE, *ex dem.*, WILLIAM A. CARR, plaintiff in error, *vs.* The GEORGIA RAILROAD AND BANKING COMPANY, defendants in error.

When a railroad company claimed the right to deviate from the original route surveyed for their road, and specially designated in a deed of conveyance made by the plaintiff to them, granting the right of way, through his land, in locating their road under the clause in their deed containing the following words, "with liberty to make such slight alterations in the route now surveyed, as not materially to change the route now surveyed;" it was held, in a controversy between the plaintiff and the company, as to whether the road was located on the land conveyed by the deed of the plaintiff, that the latter might give in evidence, upon the trial, the situation, value and condition of the land, over which the original route was surveyed, and described in the deed, as well as that over which the road was finally located, for the purpose of showing the *materiality* of the variation, as affecting the rights of the respective parties.

When a statute, granting a charter to a railroad company, provides for the assessment of damages in a summary way, to be paid to the landholder whose private property shall be taken for the use of the road, there being no negative words in the statute, express or implied, the landholder, whose property is thus taken, is not deprived of his common-law remedy to recover damages therefor: the statute creates no new right, and being in derogation of a common-law right, must be strictly construed; the summary remedy given by the statute is *cumulative* only.

Private property cannot be taken for public use without a just compensation; and where a railroad charter provides, adequate security shall be given to the landholder, whose property shall be taken for the use of the road, for the payment of such damages as shall be assessed in the manner pointed out thereby, no title to the land thus taken vests in the company, nor can the company appropriate the same to the *exclusive use* of the road, so as to defeat the right of the landholder to maintain trespass in ejectment therefor, until such adequate security shall be given; and it is incumbent on the defendants to allege in their plea, and prove at the trial, that the provisions of their charter, in that respect, have been strictly complied with, so that the landholder can be deprived of his title to his property, for the use of

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For the facts of the case, and the errors assigned, see the opinion of the Supreme Court, delivered by his honor HIRAM WARNER.

LUMPKIN, Judge, being a stockholder in the Georgia Railroad and Banking Company, gave no opinion in the case.

H. and T. R. R. COBB and WILLIAM H. HULL, for the plaintiff in error.

T. R. R. COBB argued as follows:

The right of way is an incorporeal hereditament, a mere easement growing out of the freehold which remains in the grantor.—*Cortelyn vs. Van Brunt*, 2 John. R. 357, 15 ib. 447; *Gidney vs. Earle*, 12 Wen. 98.

The freehold remaining in the grantor, he is entitled to possess and use it in every manner consistent with the right of passage. And for any exclusive appropriation, he may maintain trespass to his possession, or ejectment to recover it back.—1 *Burrow*, 143; *Cortelyn vs. Van Brunt*, 2 John. R. 363; *Gidney vs. Earle*, 12 Wen. 98; 15 John. R. 447; *Trustees of the Presbyterian Soc. in Waterloo vs. The Auburn and Rochester R. R. Co.* 3 Hill. (N. Y.) 567.

This being the rule of law, even if the defendants had a right of way over the premises in dispute, by grant from plaintiff, he could maintain ejectment against them for any exclusive possession of it. The building of a depot is such an exclusive possession.—*Cortelyn vs. Van Brunt*, 2 John. 357; *Lyman vs. Arnold et al.* 5 Mason, 195; 3 Kent, 419.

Even if the grant of the right of way would convey the right of building a depot, the accepting of a deed to a specific number of lots for the purpose of erecting a depot thereon, would restrict the company to those lots, so long as they retained the land so conveyed.—*Goodman vs. Gilbert*, 9 Mass. 510; *Phelps vs. Townsend*, 8 Pick. 392.

If the deed from Carr to the railroad company, as to the right of way, did not cover the premises in dispute, the next question is: Is there anything in the charter of the company which would defeat this action? and this brings up more directly the errors complained of in the court below.

Before entering upon this investigation, it might be well to refer to some of the rules governing the construction of such statutes.

"A statute in favor of a corporation or particular persons, and in derogation of common right, should be strictly construed."—*Sprague vs. Birdsall*, 2 Conn. 419; *Coolidge vs. Williams*, 4 Mass. 140; 11 Pet. 465; 4 Hill. (N. Y.) 76, 92; 3 John. Cases, 107; 1 Bur. 377.

"Every statute authority in derogation of the common law, to divest the title of one and transfer it to another, must be strictly pursued, or the title will not pass."—*Sharp vs. Speir*, 4 Hill, 76; *Sharp vs. Johnson*, 4 ib. 92.

Railway acts are to be construed strictly against the party obtaining them, and liberally for the public.—*Parker vs. The Great Western Railway Co.* 7 Scott, N. R. 835.

"An affirmative statute (without a negative expressed or implied) does not take away the common-law right, and the party may make his election, to proceed under the statute or at common law."—1 *Chitty's Gen'l Prac.* 26; 1 *Comyn Actions upon Stat. C.* 6 Bac. Abr. 376, and cases cited; *Crittenden vs. Wilson*, 5 Cowen 165; 5 John. R. 175; 10 ib. 389; 13 ib. 322.

The first section of the amended charter of the Georgia Railroad Company, passed in 1836, reads as follows: "From and after the passing of this act, the 11th sect. of (the act of Incorporation) be and the same is hereby repealed, and that in all cases in which disagreement may exist, or may hereafter arise between individuals or incorporations and the Georgia Railroad and Banking Company, as to the right of way or damages to property, the disagreement shall be settled as prescribed in the 15th section" (of the charter of the Central Railroad.)—*Prince*, 359.

The 15th section referred to, reads as follows: "When any person shall be himself aggrieved or injured by the said railroad being cut or carried through

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land, or by the use of lumber or other materials from any lands in the neighborhood of said road, or by any other works of the company; or when the said company cannot agree with any person, through or on whose land the said railway or appendages shall be conducted, or from whose land timber or other materials shall be taken for the use of the said road, as to the damage sustained, the amount of such damage or injury shall be ascertained and determined by the written award of three sworn appraisers, all of whom shall be disinterested freeholders of the county where the land in dispute lies; to be chosen, one by the company, one by such owner, if he shall think proper, and one by the Inferior Court of the county where such land lies, or by any three of the justices of said court in vacation. But if such owner shall decline to appoint an appraiser, then two to be appointed by the Inferior Court, &c., and the decision shall vest in the company the *fee simple* of the land in question, and, for the other party, a judgment for its value thus ascertained, which may be enforced by the ordinary process of said court, &c.—*Prince*, 331.

A proviso to said section reads: "Provided that no difference or disagreement between the company and any landholder shall operate by injunction or otherwise to suspend the progress of said work, but the same shall in all cases be continued without interruption on adequate security being given by said company to the landholder to pay such damages as shall be assessed in manner aforesaid."—*Prince*, 332.

The prerogative exercised by the Legislature in passing this statute, is the highest known to the laws of the land, viz: taking private property for public use. Without arguing here the question of the constitutionality of such acts, it may be well to refer to the facts, that such grants by the Legislature, in the different States, when sustained, have been upon the single principle, that *just compensation was previously provided*—*Beekman vs. Saratoga and Schenectady R. R. Co.*, 3 *Paige R.* 45.

Upon these sections I would remark:

1st. The operation of the statute is to vest *not the right of way*, but *the fee simple* in the company. It does not merely append an easement to the land, but entirely divests the title from the landholder.

2d. The section adopting the 15th section as a part of the charter of the Georgia Railroad and Banking Company, expressly restricts it to "*all cases in which disagreement may exist or may arise, as to the right of way or damages to property.*" Can it be made to apply to a case where there is no disagreement—but on the contrary a *deed has been given to the right of way*, and there is no complaint of damage done property upon the way?

The Legislature have declared this work of public use, and those persons through whose land it must pass, if they will not agree upon terms with the company for the right of way, the Legislature have prescribed a mode by which the company may divest them of their title and vest the fee simple in themselves. Is not the doctrine monstrous in the extreme that the landholder—who has done everything that the charter was intended to force him to do—should still be subject to have the fee simple of his land wrested away from him and vested in the company. If the application was now at the instance of the company, under their charter, to obtain the *fee simple* to this land, would not a plea of a deed of right of way accepted by the company be sustained by the court? The answer of the court would be to them, "You have agreed with the landholder—it is not a case of *disagreement* contemplated by your charter."

This is not only the answer of the law, but of justice. Necessity and the public benefit are plead as excuses for depriving the landholder of his property. Yielding to that necessity and the public benefit, he voluntarily gives what they require. Can the law wrest more from him? If the strict letter would, (which in this case it does not,) the necessity of the case being the basis of its constitutionality,—that necessity failing the law would become unconstitutional—*Ratione cessante, cessat ita lex*.

'his view then of this statute, there being *no disagreement* between the par-

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ties, the defendants having accepted a deed to the right of way, must stand or fall by that deed.

In this connection we may properly notice that part of his Honor's charge, which says:

"That in the present case where a deed granting the right of way through the plaintiff's land had been made by plaintiff, and the defendant had located the road under the belief, that the grant had been pursued, it was necessary for the plaintiff to give the proper officers of the company notice of his considering himself aggrieved and requiring a proceeding under the provisions of the charter, to assess the damages. That as no such notice had been given, the plaintiff could not in law recover."

His Honor takes for granted two facts on which we would, if allowed, join issue:

1st. That the defendants located the road under the belief that the grant had been pursued; and

2d. That no notice was given of the plaintiff's feeling himself aggrieved. However, if the facts were so, his Honor's law is certainly new. A, owning two adjoining lots of land, sells and conveys one to B—B instead of possessing himself of the one which he purchases, takes possession of the other, still the property of A—under the belief, if you choose, that it is the one he purchased. Has A no right of action against B, without first giving him notice of his mistake?

B, as every one who purchases property, takes possession at his own peril, and if his title proves to be invalid, he is a trespasser, as against the legal owner.

When the railroad company went to locate their road under the grant of the right of way, it was for them to see to it that they pursued the grant. So soon as they overstepped the grant, they became trespassers and are liable as such. His Honor says *it was necessary* for him to give the proper officers notice. What law created that necessity? We have seen between man and man there is no such necessity. What law places this company upon a higher footing?

The statute requires no such notice. What kind of notice should it be? In writing or verbal. It was in testimony that the plaintiff protested against the change of route and against the location of the depot, objecting all he knew how.

His Honor says *no such notice is given*.

We must suppose, then, it should have been in writing: "Notice to the proper officers?" Who are the officers to be notified? The engineer, the president, or whom? Each of these were informed of the objection and also the sub-engineer, who made the alteration. His Honor says the *proper* officers. Who are they? The statute not specifying any such notice to be given, is equally silent, of course, upon whom it must be served. It is the misfortune of this plaintiff to have been ignorant of any law specifying what sort of notice, if any, need be served, and upon whom?

The statute, so far from requiring the landholder to give notice to the company of his requiring a proceeding to be had under the charter, contemplates this proceeding to progress against the wishes and consent of the landholder; for it provides for the Inferior Court to appoint two of the appraisers if he declines, and gives him the appointment of one "*if he shall think proper*."

This brings us to our third position with reference to this charter, viz:

3d. That the proceeding authorized under it, is for the benefit of the company to obtain the fee simple of land over which the owner will not grant them the right of way, and that the payment of a just compensation is a *condition precedent* to the title becoming vested in them; and consequently to protect themselves under their charter, they must aver and prove that they have had assessed and paid a *just compensation*—or at least under the proviso to the 15th section—that they had given *ample security* for the payment of whatever damages might be assessed against them.

This proviso settles beyond question, that the railroad company have no right to enter upon, much less exclusively possess, the land, until adequate security given to the landholder for the damages which might be assessed.

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"The same shall in all cases be continued without interruption, on *adequate security being given*," &c. On this branch of the argument, we could not do better than refer to the long and able investigation and decisions of this identical question in the Court for the Correction of Errors of the State of New York, in the case of *Bloodgood vs. The Mohawk and Hudson Railroad Company*, 18 Wend. 9, 79. The provision in their charter is the same—"and in cases of disagreement of price," appraisers shall be appointed, whose award shall vest the fee simple of the land in the company. The court decide, "When power is given to a railroad company to enter upon, take possession of and use the lands of individuals in the construction and maintenance of their road, the section granting the power contains a proviso that the lands so taken should be purchased by the company, and in case of disagreement as to price, that the damages of the owner should be appraised in a particular manner—that in view of the constitutional prohibition to the taking of private property without making just compensation to the owner, the proviso above referred to must be deemed a *condition precedent*, and that the plea of the company put in by them to a declaration in an action of trespass *q. c. jr.* was imperfect in not averring the assessment and payment of the damages previous to entry upon the land and the appropriation of the same to the use of the company."

Says the Chancellor, page 18, under a different construction: "I should hold that the provision which authorizes the appropriation of the plaintiff's property to the use of the corporation, *before* the damages had been ascertained and paid, was *unconstitutional and void*."

Senator Edwards says, p. 26: "If the act does not require it, (the assessment and payment of the damages,) on taking possession of the land and constructing the road, then I am prepared to say, that in my judgment it is in *violation of the Constitution and void*, and of course, could form no justification for the trespass alleged. The Constitution declares, that private property shall not be taken for public use without a just compensation. When is the compensation to be made? Clearly upon the taking of the property—for it declares it shall not be taken without a just compensation. It is to be simultaneous with the act of taking the property, that is, depriving the owner of the use and benefit of it, and appropriating it to the public use. This appears to me to be the fair and rational construction of this clause of the Constitution—the framers of it could not have designed that the private property of individuals, which in some instances might constitute their whole means of subsistence, should be taken *upon credit*."

In their wisdom, the Legislature of Georgia have thought otherwise, and authorized the taking of the property *upon credit*; but it must be *adequate security given*. At least, then, before the defendants could justify taking possession of plaintiff's lands, they should have averred and proved that they had given adequate security for the payment of damages assessed.

If the court, then, should be of opinion that the defendants are not debarred from resorting to the extraordinary powers granted in their charter, by having accepted a deed to the right of way, and the fact of there being no *disagreement* between the parties in the sense of the statute; still, under this view of the case, the court erred in charging the jury that the charter of the company would bar the plaintiff of his right of action—they not having averred or proved an assessment of the damages, or the giving of *adequate security* for the payment of the damages.

4th. The remedy pointed out in the statute for the assessment of damages is at the instance of the corporation alone, and is not within the reach of the person aggrieved. This is evident, not only from the fact that such is the construction judicially placed upon it by our courts, but from the statute itself, which, while it provides for the appointment of the appraiser when the individual refuses, makes no provision when the company refuses. The Legislature could never have intended to have left the rights of parties at the whim and caprice of a corporation. If the party aggrieved, then, has no remedy within his reach and at his instance, how can the statutory remedy afforded the company bar the party's right at

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common law? He would be placed in this singular position without a remedy, except at the mercy of the railroad company.

His Honor seems to place the construction upon the law, that the refusal of the company to commence the proceeding under the statute, would give the party aggrieved a right of action. The statute, under his Honor's construction, takes away the common-law right of action from the plaintiff, and, at the same time, points out no remedy for him. His Honor, however, would amend upon the statute, and upon notice given by the party aggrieved, and a refusal upon the part of the company to commence the proceeding pointed out in the statute, his Honor would give the party aggrieved a right of action. What kind of action? Does it revive the common-law right—to sue in trespass? Or must he bring case, and set off the notice and refusal? Or must he proceed to have the charter forfeited? Again: Within what time must the company commence the proceeding after notice? What length of time—delay—would give the party aggrieved a right of action? The only answer that can be given to his Honor's position is, "*Ita lex, non scripta est.*" Such a latitude of construction given the statute, would lead to endless difficulties.

In short, the statute providing this remedy, at the instance of the corporation, and for their benefit, in order to be plead as a bar to an action in behalf of a party aggrieved, must show, not that the charter gave them this extraordinary remedy; but, moreover, that they have taken the benefit of the statute, and the dispute is "*res adjudicata.*"

5th. Lastly, even if this remedy were within the reach of the party aggrieved, it is cumulative of the common law, and he has his option either to proceed under the statute, or to resort to his common-law action.—1 *Chit. Genl Prac.* 26; 1 *Comyn Action upon Statute, C.*; 6 *Bac. Ab.* 376; 5 *Con.* 165; 5 *John. R.* 175; 10 *ib.* 389; 13 *ib.* 322; *Coats vs. The Clarence Railway Co.* 4 *Eng. Cond. Chancery Reports*, 378.

To recapitulate, as to the construction of the statute:—

1st. The statute, pointing out a mode to obtain the *fee simple* of the land to the company, in the event of a *disagreement between the parties*, does not apply to a case where the parties agree, and a deed is made and accepted to the right of way.

2d. The company having accepted the deed to the right of way, cannot abandon the deed, and resort to the mode specified in the charter for obtaining the *fee simple*.

3d. That if the company abandon the deed, and resort to their charter, before they can justify a trespass under their charter, they must aver and prove that the damages have been admitted and paid under the statute—in other words, the assessment and payment of a just compensation, is a *condition precedent* to their right of entry; or, at least, under the proviso of the statute, the giving of *adequate security* is a *condition precedent* to the right of entry.—18 *Wend* 9.

4th. The remedy under the statute, being at the instance of the corporation alone, does not debar the party aggrieved from his common-law right of action, so long as the company fail or neglect to take advantage of the statutory provision.

5th. Consequently, in order to sustain his action at common law, it is not necessary for him to prove any notice to the company, requiring them to proceed to have the damages assessed under the statute.

A stockholder is an incompetent juror where the company is a party, and it is a principal challenge.—3 *Bac. Abr.* 756; 2 *Comyn Dig.* 204; 2 *John. R.* 194, (*Wood vs. Stoddard*); 19 *John. R.* 115; 2 *Caines*, 133.

Where a deed authorizes the grantee to make a *slight* variation, not materially altering the route designated, it is competent to give in testimony as to the value of the land occupied by the route designated in the deed, and the land to which the route has been changed; also testimony as to the damage done the grantor by the saving to the grantee, for the purpose of showing the *materiality* of the variation, which was a question for the jury to decide.—*Osborn vs. Wise*, 7 *Car. and*

Pay. 761; *Toule vs. Bigelow*, 10 *Mass.* 379; 3 *Philip's Ev. (Cowen's note)* 1402; 4 *Dana*, 336.

An engineer is entitled to give his opinion to the jury upon matters coming strictly within his profession. The materiality of a change in the route is one of those matters.—1 *Greenleaf*, 489-90.

JUNIUS HILLYER, for the defendant in error,

Insisted that there was no error in the court below, on any of the grounds assigned by the plaintiff, and that, by the charter of the company, they have a right to build a railroad from Augusta to Athens. The road is a public highway, and the State has the right to seize the land of the citizen for the purpose of locating the road; and it is not material whether the State builds the road, or whether it authorizes an incorporation to build it; and that plaintiff cannot recover in ejectment. His only remedy is a suit at law, or under the charter for damages—and relied on the following authorities:—4 *Wend.* 667; *Prince Dig.* 304, 311, 331, 358.

By the Court—WARNER, Judge.

This was an action of trespass in ejectment, brought by the plaintiff against the defendants, to recover the possession of lot of land number twenty-six, (26,) in a survey made by E. L. Thomas on the east side of the North Oconee river, in the county of Clark. To this action the defendants plead not guilty, and also relied on the charter granted by the Legislature to the company.

It appears from the record, the plaintiff, in the year 1838, executed two deeds to the defendants, by one of which he granted the right of way over his land for the location of the railroad, the same to be located on a route which had previously been surveyed, particularly designated and staked by the company, "known and distinguished as the most southern or western route, entering said Carr's land on the line between him and Robert Morris' field, and terminating the said road, on said Carr's land, at or near the fence on or near the top of the hill, just above the Factory Company's land, with the liberty to make such *slight alterations* in the route now surveyed so as not *materially* to change the location of the route as already designated, &c." The other deed conveys to the company, lots number 13, 14, 15, 16 and 28. The first deed, it will be remembered, does not convey to the defendants a *general right of way* over the plaintiff's land, on which to build the road, but is confined to a *certain specified* route, then surveyed and located, with liberty to the company to make such *slight alterations* in the route as not *materially to change the location of the same*.

The first question made on the trial was, whether the deeds of the plaintiff covered the premises in dispute; the plaintiff contending the road was not built on the land granted by the deeds, and offered to show, the land over which the road now runs was much more valuable than that over which the route was first located, and which never could have been intended, by the contracting parties, to have been included under the terms, "*slight alterations, so as not materially to change the location of the route as already designated.*"

The court below decided, that testimony to prove the value of the land traversed by the respective routes, was not admissible, "on the ground, the word *materially*, in the deed of Carr, had no reference particularly to value of the land, but was used with reference to distance or location,

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and it was immaterial whether the land on which the road was located, was more or less valuable." The words employed by the contracting parties are to be taken in their common acceptation, and we are to understand them in that sense. The specified route was not to be altered or changed, so as *materially* to affect the rights of Carr, or his interests in the property over which it was located. Whether the present location of the road was such a slight and immaterial variation from the route originally surveyed, as was contemplated by the parties, was the question for the jury to decide from the evidence; and we are of the opinion, it was competent for the plaintiff to have shown, upon the trial, the relative value of the land traversed by the two routes, the nature and condition of the same.

Although the words used in the deed may have had reference to distance or location, yet a change of location might become very *material*, with reference to the interests to be affected by such change. If the altered route was to destroy a valuable building-lot, or a valuable spring, incident thereto, which was not done by the original route, the value of the ground traversed by the respective routes, would, in our judgment, be a proper subject of inquiry, for the purpose of ascertaining the *materiality* of the alteration of the route by the company, with reference to the interests of the plaintiff. Does the altered route materially affect or prejudice the rights or interests of the plaintiff? To enable the jury to determine this question correctly, evidence may be given as to the value of the rights and interests of the plaintiff, affected by the location of the road on the altered route, as well as to the nature and extent thereof, and also the value and extent of the rights and interests of the plaintiff, which would have been affected by the location of the road on the original route surveyed and staked by the company. The situation, value, and relative position of the property traversed by the two routes, would, in our judgment, go very far to illustrate and explain what the contracting parties intended, in reference to the subject matter of the contract, by the use of the words, "with liberty to make such slight alterations in the route, as now surveyed, so as not *materially* to change the location of the route, as already designated." Suppose the tier of lots, over which the original route was located, were of the average value of one hundred dollars each, and the tier of lots over which the road is now located, are of the average value of five hundred dollars each, would not the increased value of the property taken for the location of the road, be evidence of the *materiality* of the alteration of the route, so far as the rights of the plaintiff are concerned? Would the authority contained in the deed, "to make such *slight alterations* in the route as not *materially* to change the location," justify the company in abandoning the route over the tier of lots worth one hundred dollars, and locating their road over the tier of lots worth five hundred dollars? We think not; and that the value of the land traversed by the two routes was admissible, for the purpose of showing the *materiality* of the alteration of the same, and ought to have been admitted by the court below, on the trial of the cause.

The next ground of error assigned is, to the charge of the court to the jury. The court below charged the jury, "that the defendants, by their acts of incorporation, and those amendatory thereof, were authorized to construct a road from Augusta to Athens; provision was made in the charter for settling disputes between the company and owners of lands throu

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which the road might pass. In that provision, it was not declared who should make the first application to the Inferior Court, to appoint commissioners to assess the damages; that in the present case, when a deed granting the right of way through the plaintiff's land, had been made by plaintiff, and the defendants had located their road, under the *belief* that the grant had been pursued, it was necessary for the plaintiff to give the proper officers of the company *notice* of his considering himself aggrieved, and requiring a proceeding, under the provisions of the charter, to assess the damage; that as *no such notice had been given, the plaintiff could not in law recover.*"

By the amendatory act of 26th December, 1836, (*Prince's Dig.* 358,) it is declared, "that in all cases in which disagreement may exist, or may hereafter arise between individuals, or incorporations and the Georgia Railroad and Banking Company as to the right of way or damages to property, the disagreement shall be settled as prescribed in the fifteenth section of "an act to amend an act, incorporating the Central Railroad and Canal Company of Georgia." By the fifteenth section of the Central Railroad and Canal Company it is declared: "When any person shall feel himself aggrieved or injured by the said railroad being cut, or carried through his land, or by the use of lumber or other materials from any lands in the neighborhood of said road, or by any other works of the company; or when the said company cannot agree with any person through or on whose land the said railway or appendages shall be conducted, or from whose land, timber, or other materials shall be taken for the use of the said road, as to the damages sustained, the amount of such damage, or injury, shall be ascertained and determined by the written award of three sworn appraisers, all of whom shall be disinterested freeholders of the county where the land in dispute lies, to be chosen, one by the company, one by such owner, if he shall think proper, and one by the Inferior Court of the county where such land lies, or by any three of the justices of such court, in vacation; but if such owner shall decline to appoint an appraiser, then two to be appointed by the Inferior Court, or three justices thereof in vacation as aforesaid, one by said company, the award of whom, in writing, shall operate as a judgment for the amount as against the company, and shall be enforced by an execution from the Inferior Court, with the right of appeal to either party, to be tried by a special jury, at the next term thereafter of the Superior Court of said county, and the decision shall vest in the company the fee simple of the land in question, and in the other party a judgment for its value thus ascertained, which may be enforced by the ordinary proofs of said court, &c. Provided, that no difference, or disagreement between the company and any landholder, shall operate by injunction or otherwise, to suspend the progress of said work, but the same shall in all cases be continued without interruption, an adequate security being given by said company to the landholder to pay such damages as shall be assessed, in manner aforesaid. And provided also, it do not interfere with the house, mill, or other building or yard enclosure of individuals. Provided, *five days' notice shall be given to the owner of such land of the time and place of trial.*"—*Prince's Dig.* 331.

Whether a judgment against the company for the damages assessed, to be enforced by the ordinary process of the court, or adequate security being given by the company to the landholder to pay damages, is such a just compensation "for the public use of private

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property," as is contemplated by the Constitution, was not discussed on the argument, and we do not desire to be considered as expressing any opinion on that question. Whether the deeds of the plaintiff to the defendants covered the premises in dispute, was a question of fact for the jury; and the charge of the court on that branch of the case is not excepted to. If, however, the deeds did not cover the premises in dispute, then, no legal protection was afforded the defendants by them against the plaintiff's right to recover. The title of the defendants under their deeds, and their title under their charter, present two separate and distinct sources of title. The deeds of the plaintiff either protect the defendants in the possession of the premises, or they do not: if they do, there is an end of the controversy; but if they do not, then the defendants are thrown upon their charter for their title, and the question is, have they shown such a title by their plea, and the evidence under it, as will protect them in law, against the plaintiff's right to recover? The action of trespass in ejectment has been instituted for the sole purpose of trying the title to lands or tenements.—3 *Bl. Com.* 203. In an action of ejectment, the legal title must prevail. An equitable title or interest cannot be set up as a defence, against the legal title.—*Doe ex dem. Da Costa, vs. Wharton*, 8 *Term. Rep.* 2; *Jackson vs. Pierce*, 2 *John. Rep.* 221; *Jackson vs. Van Slyck*, 8 *John. Rep.* 487; *Sinclair vs. Jackson*, 8 *Cowen's Rep.* 543; *Jackson vs. Deyo*, 3 *John. Rep.* 417.

The defendants plead the general issue of not guilty, and further allege, if they ever did enter; and commit the trespasses complained of, they had a right to do so, under the statutes of this State, giving the defendants a right to construct a railroad from the city of Augusta to Athens in Clark county, and for that purpose had a right to pass through the lands of the plaintiff and others, and giving to plaintiff and others a specific mode of redress, and remedy for any acts or use of such land so taken for said road; and that if any trespasses were made, the same were in the construction and use of a road, made under such statute; all this, the defendants are ready to verify, &c.

By the 5th article of the amended Constitution of the United States, it is declared, "*private property shall not be taken for public use, without just compensation.*" The power of taking private property for public use, can only be justified by the law of necessity, and before the plaintiff can be deprived of his land for such a purpose under the charter of the company, it is incumbent on them to show everything has been done which the Constitution and the charter require to be done. "In the construction of statutes, made in favor of corporations or particular persons, and in derogation of common right, care should be taken not to extend them beyond their express words or their clear import.—*Sprague vs. Birdsall*, 2 *Cow. Rep.* 420; *Melody vs. Reab*, 4 *Mass. Rep.* 473.

The defendants claim the right, under their charter, to take the private property of the plaintiff, and appropriate it for the use of their road: indeed, their plea admits they have so taken it, but does not show they have made, or offered to make him any "just compensation" therefor, by giving him *adequate security for the damages*, as provided in the charter, or in *any other manner whatever*. If the charter had contained no provision for making compensation to the plaintiff for his land, it would be in direct conflict with the Constitution, and would

To enable the defendants to protect themselves under their

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they should have at least plead, and proved at the trial, they had given adequate security to the plaintiff, to pay such damages as should be assessed against them for taking and appropriating his land to the use and construction of their road.

Whether the *right of action* against the Georgia Railroad and Banking Company would give to the plaintiff a "*just compensation*" for his property, we cannot judicially know; but such a right of action against the Monroe Railroad and Banking Company, and some other railroad companies in this State, we have reasons to believe, would fall very far short of being that "*just compensation*" contemplated by the Constitution. We must settle the principle, as applicable to all chartered companies authorized to take private property for public use, without regard to their solvency or insolvency; and hold them down to a strict compliance with the provisions of their constitutional charters in that regard.

Admitting the charter of the company as plead, to have been sufficient to have authorized the defendants to have entered upon the plaintiff's land for the purpose of *surveying and locating the road*; yet, we are of the opinion, the plea is not sufficient to authorize them to appropriate the same for the *permanent use* and construction of the road, and vest the *title thereto* in the company, without showing that they had given to the plaintiff *adequate security*, to pay such damages as should be assessed in the manner pointed out thereby.

This is the only provision in the charter, which, in our judgment, gives life and vitality to it; without it, there is no "*adequate security*" to compensate the landholder for his private property, taken for the use of the public, unless, indeed, a *right of action* against the company shall be considered such a "*just compensation*" as is contemplated by the Constitution.

In the case of *Bloodgood vs. The Mohawk and Hudson Railroad Company*, (18 Wend. Rep. 9,) the identical question which we have been considering, was thoroughly discussed and decided; and in our judgment, decided in accordance with the meaning and spirit of the fundamental law of the land. The courts of justice cannot well be too vigilant in guarding the rights of the citizen, against the eager, and oftentimes imprudent, hasty hand of legislation. While we feel bound to protect all the *vested* rights which have been legitimately acquired by all chartered companies, in the most sacred manner, yet we feel bound to guard, with great care and vigilance, the rights of the citizen against all unauthorized encroachments on their part, by confining them strictly within the limits of their respective charters.

The naked charter of the company, as set forth in the defendants' plea, without an averment of a compliance, on their part, with that provision which requires them to give *adequate security* to the landholder, who is the plaintiff in the action of ejectment, does not justify them in seizing, and appropriating to their *exclusive use*, his private property. Admitting the giving the adequate security by the company, to pay the damages which may be assessed, is such a "*just compensation*" as required by the Constitution, which would authorize the company to take the private property of the plaintiff for the public use; yet it is clear, in this case, such *just compensation* has not been made. Until that is done, it will hardly be contended that the *title* of the plaintiff has been

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legally divested, and the same *vested* in the defendants. To vest the title in the defendants to the premises in dispute, or to authorize them to appropriate the same to their *exclusive use*, under their charter, it is incumbent on them to show they have made the plaintiff "*just compensation*" therefor, which in our judgment, does not appear from the record in this case.

The court below charged the jury, that it was necessary for the plaintiff to recover in law; that he should have given the proper officers of the company notice of his considering himself aggrieved, and required a proceeding, under the provisions of the charter, to assess the damages. That as no *such notice* had been given, the plaintiff could not recover. The right of the plaintiff to recover in this action, it will be perceived, was placed on the ground of *notice* by the plaintiff to the defendants, that he considered himself aggrieved by the company appropriating his private property for the use of their road. The reason given for requiring the notice is, that the defendants had a deed granting the right of way through the plaintiff's land, and had located the road under the *belief* the grant in the deed had been pursued. What may have been the *belief* of the defendants upon this subject, when locating their road, it is somewhat difficult for human tribunals to decide.

The right of way granted by the deed, as we have already seen, was for a *certain specified route*, surveyed and staked, with the liberty to make *slight and immaterial alterations*.

J. M. Hunt testifies the road was located with a variation at the point of termination, some 70 or 80 yards from the place where the stakes were first placed; that neither the road nor depot touch either of the lots deeded by Carr to the company. If the road had run as first staked, it would not touch either lots number 24, 25, 26, or 27, nor would fifty feet on either side. Fifty feet on either side of the road now located, takes a belt through 26, 27, and a portion of 25 and 24. According to the plat furnished us by the defendant's counsel, it appears the first route staked, and which was conveyed by the plaintiff to the company, runs on the north side of the middle of one tier of lots, and the road, as located, runs through another tier of lots, and nearly through the centre of lots 26 and 27.

Pearson B. Monk testifies he was engaged in locating the road, and that the plaintiff objected, at the time, to the alteration of the route.

Willis Cooper testifies he did, as the agent of the plaintiff, who was absent from the State, protest, at the time of the location and building the depot, against the company making the alteration they did.

But admit the defendants *did believe* they had located their road on the land conveyed by the deed of the plaintiff, when, in point of fact, it was *not so located*, would their mistake in any way affect the plaintiff's title to the land not conveyed, or would *their mistake vest the title in themselves*?

Individuals frequently purchase land, pay their money for it, and go into possession under a warranty deed, with the most *perfect belief* they have a good title thereto, and yet are ousted by one having a paramount title to the premises. He who has the paramount title, would hardly think it necessary, we suppose, to notify the purchaser in possession, who purchased under the *belief* he had a good title, as a *condition precedent* to his right in law to maintain ejectment for the premises in dis-

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Such notice might be considered neighborly and equitable, perhaps, but would not affect the *legal title* of the respective parties.

In the action of ejectment, as we have already seen, the plaintiff must recover, and the defendants defend, upon the strength of the *legal title*. The defendants do not claim as the *tenants* of the plaintiff.

In *Jackson vs. Deyo*, 3 *John. Rep.* 417, already cited, it was expressly decided, a person in possession of land, who claims to hold it in fee, is not entitled to notice previous to bringing an action of ejectment; although the defendant in that case, held under an *equitable* title, the court say: "It never has been decided, that a notice to quit was necessary, unless where the relation of *landlord and tenant* existed. We might as well require a previous notice to quit, in every case." As we have already stated, the deeds of the plaintiff to the defendants, either cover the premises in dispute or they do not; if the deeds *do not cover the premises in dispute*, then the defendants stand as if no deeds had ever been made, so far as any *legal title* conveyed thereby is concerned, and they are thrown upon their charter for a title, to defend themselves against the plaintiff's action. We have no doubt, the defendants were at liberty, notwithstanding the grant of the special right of way by the plaintiff to them, to abandon the route granted, and locate their road on a different route through the plaintiff's land, provided their charter is constitutional, and they have complied with its provisions in that respect. It is true, the charter does not declare which party shall make application for the appointment of commissioners to assess the damages which the landholder may sustain, by the taking of his private property for the use of the company, nor is it necessary for us now to decide that question: but when we take into consideration, that the company is the moving party, and the citizen in the peaceable and quiet enjoyment of his property, guaranteed to him by the constitution and laws of his country, of which he cannot be deprived, but for the use of the public; and the *proviso* in the charter, requiring *five days' notice* shall be given to the owner of the land, of the time and place of trial, when the assessment of damages is to be made; added to the fact, he is entitled to select one appraiser, if he shall think proper, and the mode of proceeding pointed out, if he declines to appoint an appraiser; we should hesitate before deciding, it was not both the moral and legal duty of the company to make the application, before an exclusive appropriation of his private property to the use of the road—the more especially when their agents were notified of his dissatisfaction at the time of its location.

Conceding, however, the plaintiff in this action had a remedy under the charter for the damages sustained, in consequence of taking his private property for the use of the road, did this *affirmative* remedy take away or destroy his common-law right of action? We think not; for the charter providing for the assessment of *damages* for depriving the plaintiff of his property, gave him no *new right*; he was entitled to damages by the common law, before the enactment of the statute; and there are no *negative* words in the statute, expressed or implied, from which we can arrive at the conclusion, it was the intention of the Legislature to deprive the plaintiff of his common-law remedy. The remedy given by the statute was merely *cumulative*: "If a statute gives a remedy in the

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affirmative, (without a negative expressed or implied,) for a matter which was actionable by the common law, the party may sue at the common law as well as upon the statute, for this does not take away the common law."—1 *Comyn's Dig.* 447, letter C; 1 *Chitty's Pleading*, 144; *Rex vs. Robinson*, 2 *Burrow's Rep.* 803; 1 *Saunders Rep.* 136, note 4; *Crittenden vs. Wilson*, 5 *Cowen's Rep.* 165; *Scidmore vs. Smith*, 13 *John. Rep.* 322; *Farmer's Turnpike vs. Coventry*, 10 *John. Rep.* marginal page 389; *Almy vs. Harris*, 5 *John. Rep.* 175.

Such we believe to have been the common law, at the time of the enactment of our adopting statute in 1784, and the giving of notice to the defendants by the plaintiff, that he considered himself aggrieved by their *exclusive* appropriation of his private property for the use of the road, was not necessary to enable him to maintain his common-law remedy of trespass in ejectment, for the premises thus exclusively appropriated without his consent. The statute under which the defendants claim, being in derogation of a common-law right, must be strictly construed.

We are, therefore, of the opinion, the court below erred in its charge to the jury: "that as no such notice had been given, the plaintiff could not in law recover," inasmuch as the plaintiff's common-law right of action of trespass in ejectment, did not depend on such notice being given, and ought not to have been controlled thereby. Considering the title of the defendants, independent of the deeds of conveyance, and as depending on their charter alone, our conclusion is, that the charter which provided for the assessment of damages for lands taken for the use of the road, did not take away the common-law remedy of the plaintiff, to maintain his action of trespass in ejectment for the seizure and appropriation of his private property, for the *exclusive use* of the road, and notice to the defendants that he was aggrieved thereby was not necessary to enable him to maintain such action. To have authorized the defendants to have acquired the fee-simple title to the premises in dispute, or in depriving the plaintiff thereof, and appropriating the same for the *exclusive use* of the road, under their charter, it was incumbent on them, not only to have shown by their plea, but to have proved on the trial, that they had complied with that provision in their charter which requires *adequate security* to be given by them to the plaintiff, who is the landholder, to pay such damages as might be assessed, in the manner pointed out thereby. Without such compliance on their part, they had no right under the Constitution to take the *private property* of the plaintiff for the *use of the public*; for that is the only "*just compensation*" provided for the landholder whose property is taken, except, perhaps, a *right of action and judgment against the company alone*.

Let the judgment of the court below be reversed, and a new trial granted.

ther argument, and more mature consideration, we are unwilling to disturb that opinion. The court below ruled, that if the heirs were barred, the statute protected the defendant; that is, that the statute begins to run from the death of the intestate, and not from the time of granting letters of administration upon his estate. It may be a serious question, whether, in Georgia, the heirs can bring ejectment at all. We are not now called upon to decide whether they can or not. But if they can, and they recover, their title is not good against an administrator. In England, the title of the administrator to personal property is good against the heir. Trover will lie in favor of an executor against an heir.—7 *Mod.* 99; 6 *Mod.* 151.

Our law has abolished, utterly, the distinction between personal and real estate, as it obtains in England; indeed, it has changed the whole British doctrine, as to the descent of real estate. Personalty and realty, as to distribution, and as to liability to pay debts, are placed by our statutes upon the same footing. The abolishing of primogeniture rights, and the equal divisibility of estates among all the heirs, were beyond all question, the great ends proposed to be accomplished by our Legislature.

By the act of 1789, in respect to distribution, real and personal estate, are declared to be "*precisely on the same footing.*"—*Prin. Dig.* 225. By the act of 1804, which is amendatory of the act of 1789, it is declared, "when any person holding real or personal estate shall depart this intestate," the said estate, *real and personal*, shall be considered as *altogether* (that is, as we believe, for all purposes) *of the same nature and upon the same footing.*" The statute goes on to point out the manner of the distribution.—*Prin. Dig.* 233. Thus, at a single blow, leveling all the distinctions of the English law between personal and real estate. By the act of 1812, the manner of dividing real estate, by application to the Ordinary, is prescribed.—*Prin. Dig.* 241. The effect of these statutes is to give to the administrator the same powers over real estate that he has over the personalty, and for the same purposes, to wit: first, payment of debts; and secondly, distribution. I infer so, from the general powers conferred upon him, as to estates, from the fact that it is expressly made his duty to pay the debts of the estate, (*Prin. Dig.* 229,) from the fact that he is himself authorized to apply to the Ordinary for an order to distribute real estate, (*Prin. Dig.* 241,) and from the fact that before a distributee is entitled to his share of the realty, he must give bond and security to refund his relative proportion of debts, which may be subsequently established against the estate.—*Prin. Dig.* 241. Once, however, admit that the law of the land makes no distinction between personal and real estate, but, on the contrary, abrogates all previous distinctions, by declaring them to be all of the same nature, and the same rights and duties, as to both follow as a necessary consequence.

The title to the personal property of his intestate devolves upon the administrator in England; he can sue for it and recover it even against the heir; he can aliene or encumber it. The reason is, that the law casts upon him the duty of paying the debts, and the personalty is assets for that purpose.—*Williams on Ex.* 430–1–2, 670; 4 *T. R.* 625.

l. 463. Now we believe the same power, in relation to real estate,

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is devolved upon the administrator in Georgia. Thus, we think, the right of the administrator to sue is established, and as the legal estate is in him, it may be well questioned, whether there remains in the heirs such an interest or title as would sustain an action. The title of the heirs is subordinate to that of the administrator; they have not even an interest until the debts are paid. The law lays hold of the legal estate, and deposits it in the hands of its own appointed agent, for the very purpose of protecting it against the title of the heirs, in order that the debts of the ancestor may be certainly paid; until administration had, the legal estate is in abeyance, and when granted, it devolves upon the administrator, and so soon as the estate is administered, the paramount property may be asserted by the heirs, in all the estate of the intestate not applied to the payment of debts. Unless the title of the administrator be better and stronger than all others, then is it true, that the law has clothed him with no sufficient power to execute his trust; and then is it also true, that the law affords to the creditors of intestates no sufficient security for the payment of their debts. It is no reply to this reasoning, that there may be, in fact, no debts to pay. *Non constat* that there are no debts. The law presumes debts where an estate has not been settled by administration. Moreover, the court upon the trial of an ejectment, between an administrator and a stranger holding adverse possession, cannot inquire into the condition of the estate, or settle the equities between the administrator, the heirs, and the creditors.

An executor derives his title to the effects of his testator from the will, and, therefore, they vest in him from the moment of his death. The administrator derives his title wholly from the Ordinary; he has none until his letters are granted, and the property of the deceased vests in him only from the time of the grant.—*Williams on Ex.* 431; 5 B. & A. 745, 746. Accordingly, no right of action accrues to an administrator, until he sues out letters of administration.—*Williams on Ex.* 432; 5 B. & A. 204; 2 Salk. 421. This proposition, however, respecting the vesting of an administrator's interest, must be taken with some qualification; for, for particular purposes, the letters of administration relate back to the time of the death of the intestate. So an administrator may have an action of trespass or trover, for the goods of the intestate, taken by one before the grant of his letters.—2 Roll. Abr. 399 title *Relation*, (A) *Williams*, 432.

So in ejectment by an administrator, the demise may be laid on a day after the intestate's death, but before administration granted, for the administration, when granted, will relate back, and show the title to have been in the administrator, from the death of the intestate.—*Williams on Ex.* 432; 8 East. 410; *Wheat. Selw.* 5 ed. 811. This point was expressly so decided by the Court of K. B. in Ireland, in *Patten vs. Patten*, 1 Alcock and Napier, 493.

In *Pratt vs. Swaine*, 8 B. & C. 287, Bayley, Justice, says: "Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had, at the time of his death, vested in him; but no right of action accrues to the administrator until he has sued out the letters of administration." These authorities settle two points in this case: the first is, that no right of action accrues

an administrator, until the grant of his letters; and the second is, that when granted, they relate back to the death of the intestate. If the latter proposition be true, we do not see how there can be any such cause of action, or right of entry, in the heirs, which, if neglected until the statute has run its course, will preclude the rights of the administrator. Such a right in the heirs, is incompatible with the title of the administrator, accruing by relation at the death of the intestate.

The former is indispensable to the correctness of the judgment which we are about to render in this case. By our statute of limitations, (*Prin. Dig.* 573,) the action of ejectment, to avoid the bar, must be brought within seven years next after *the title and cause of action* shall or may descend or accrue. This statute is substantially the same with the English statute of James, except as to the term. The words, *title and cause of action*, are found in both, and in precisely similar connection. The words, *cause of action*, in the English statute, have been construed to imply not only a right of action, but also that there is some person in existence who is qualified to institute process. There must be a person to sue. In accordance with the maxim of the civil law, *Contra non valentem agere non currit prescriptio*, when there is no person to sue no laches can be imputed; and applying in such case the statute of limitations would be extreme injustice. In the case of an administrator, there is no person to sue until grant of letters; and therefore the statute of limitations does not commence running until that time. This we hold now to be the law, settled upon the highest authority. The leading case on this subject is *Murray vs. The East India Company*, reported in 5 *Barn. and Ald.* 204. See also *Ang. on Limit's*, 55-6-7; 8 *Cranch*, 84; *Williams Ex'rs*, 432; 2 *Salk.* 421; 1 *Mylne and Craig Ch. R.* 118; 15 *Con. R.* 149; 9 *Leigh* (Virg.) *R.* 79; 7 *H. and Johns.* (Maryland) 14; 4 *ib.* 393; 2 *Hayw.* (N. C.) 378; 13 *Wend.* 267; 4 *McCord*, 423; 2 *Bailey*, (S. C.) 595.

If, however, the statute has once begun to run in the lifetime of the testator or intestate, it does not cease running during the period which may elapse between his death and the time at which a personal representative is constituted and duly qualified. The testator, or intestate, must have died before the statute commenced running, else the rule above laid down does not apply. And with good reason. If the testator, or intestate, was in life at the time when the adverse possession began, he might have brought his action. There was not only a cause of action, but a person in *esse*, capable of instituting process; and, failing to do so, *laches* is justly imputable to him; and the statute will be a protection to the tenant.—*Ang. on Limit's*, 57; 4 *Mees. and Welsb.* 42; 3 *Mylne and Craig Ch. R.* 455; 3 *McCord R.* 455.

In the case before us, the suit was instituted within seven years from the date of the plaintiff's letters. It only remains for us to inquire whether the court below erred in deciding that there was no sufficient evidence of the death of the intestate before the commencement of the defendant's adverse possession. The evidence is, that he was seen in the county of Jackson in 1794, and that he had not been heard of since that time. The defendant's grant bears date in 1819, and he was proven to have been in possession more than seven years before the suit was instituted. Supposing that the defendant's possession began at the

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date of the grant under which he claims, then it was necessary that the plaintiff show that his intestate died prior to 1819.

The court below, upon this point, holds the following language :

"Abandoning that test, and looking to the proofs, it appears that he was in Jackson county in 1794. It is not pretended that he ever lived in Jackson county; there is no proof where he lived, and his absence from Jackson county for so long a time cannot furnish any presumption of his death." We are of opinion, that having been seen in the county where the land lies in 1794, and a witness who saw him then testifying that he had not been heard of since, raise the presumption of his death. These facts afford *prima facie* evidence of his death, which is subject to be rebutted. The presumption of death in this case is made stronger by the fact, which appears to have been proven, that at the time he was last seen he was about fifty years of age. The fact of death may be proven by presumption, as well as by direct evidence.—*Best on Presumptions*, 191. When a person goes abroad, and is not heard of for a long time, the presumption of the continuance of life ceases at the end of seven years from the period at which he was last heard of.—*Best*, 191; 2 *Camp*. 113; 15 *East*, 293; 6 *Vesey*, 606; 6 *Sim*. 443; 3 *Bro. C. C.* 510.

In reply to this proposition, it may be said that it contemplates, first, proof of going abroad—a departure from the realm—and, afterwards, proof of not being heard of for seven years; and that, in this case, the intestate was not proven to have gone abroad, that is, in this country, beyond the limits of the State of Georgia. The rule, however, goes farther. The presumption of death is raised in cases where persons are away from their usual place of resort, and have not been heard of for seven years. Such proof is *prima facie* evidence of death. In *Doe vs. Jesson*, 6 *East*, 80, Lord Ellenborough is reported to say, "that the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living." This rule fully embraces the case now being considered. The intestate was last known to be living in 1794. In 1801, therefore, seven years from that time, according to Lord Ellenborough, the presumption of his being alive ceases. The case of *Doe on the demise of Lloyd and another vs. Deakin and another*, (4 *Barn. and Ald.* 433,) is very much like this case. There it became necessary for the plaintiff to prove the death of a person who had been tenant for life. The tenant had been a wanderer, but returned in 1804 to the neighborhood where his life estate lay, remained a short time, and went away again. After that time he had not been seen in the neighborhood. These facts were deposed to by a person who resided near the spot; and the judge directed the jury that this was *prima facie* evidence from which they might presume his death, and they, accordingly, found a verdict for the plaintiff.—*Best*, 191; 4 *B. & A.* 433; 6 *East*, 80; 1 *Blac. R.* 404; 7 *Vesey*, 590; *Smith's Leading Cases*, vol. 2, p. 339.

We are of the opinion, therefore, that the death of the plaintiff's intestate was proven to have taken place in 1801, and before the statute commenced running in favor of the defendant, that is, before the beginning of his adverse possession.

Now, if it be said that this case gives a denial to the idea that the

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statutes of limitation are favored because they are statutes of repose; if it be said that this is precisely the case where possession undisputed ought to presume a title; why, then, we are constrained to admit that these things are true; yet the reply is: the first duty and highest ambition of this court is to administer the law as it is. How far a court of equity has power, in such cases as this, to grant relief, we are not called upon to determine. Here about forty years elapsed after the death of the plaintiff's intestate before the date of his letters. This is the very case where a former administration, consistently with general justice, might be presumed, from length of time. O'Neal, Judge, in *Will vs. Elmore, 2 Bailey (S.C.) R. 595*, hints at the existence of such a rule. We are not satisfied that there is such a rule, but we are satisfied that there ought to be.

The judgment of the court below must be reversed.

No. 78.—ROBERT CRAIG *et al.*, plaintiffs in error, *vs.* JOHN W. MALTBIE, Sheriff, defendant in error.

Where a former sheriff is in custody under attachment, and the present sheriff, in answer to a rule to produce the body, shows for cause why he cannot, that the defendant has escaped from jail, without his permission or any negligence on his part, it is competent for the party moving—under the act of 1840, authorizing the return of sheriffs, constables, coroners, and justices of the peace to be traversed—to controvert the return.

If it is admitted to be true, or found so by a jury, upon an issue submitted for that purpose, that the sheriff suffered a prisoner in custody, under attachment, to go at large in the jail, with a full knowledge that there was a breach in the wall of one of the rooms, through which the defendant *could* and *did* escape—the sheriff is liable to an *attachment*, and the party injured will not be driven to his action for an escape.

For the facts of this case, and the grounds of error, see the opinion of the Supreme Court, delivered by his honor, Judge LUMPKIN.

N. L. HUTCHINS, H. and T. R. R. COBB, and — PEEPLES, for the plaintiffs in error, submitted the following points:

1st. That the sheriff is liable by rule and attachment, for the escape of a prisoner under final process, unless such escape is effected by the act of God, or the public enemies of the country; and relied on the following authorities:—1 *Archbold's Practice*, —; 1 *Sellon's Practice*, 206; 1 *Wheaton's Selwyn*, 456; *Hotchkiss*, 516, 518; 1 *Bingh.* 156, 423; 15 *Johns. Rep.* 155.

2d. That the return or showing of the sheriff is traversable, and the party requiring the return has the right to traverse the truth of such return, and cited the following authority:—*Hotchkiss*, 527.

JUNIOUS HILLYER and JOHN R. ALEXANDER, for the defendant in error.

By the Court—LUMPKIN, Judge.

At March term, 1846, of the Superior Court of Gwinnett county, a rule absolute was granted against Nelson Roberts, late Sheriff, requiring him to pay over the sum of four hundred and twenty-six dollars, to the clerk of said court, and certain plaintiffs therein named, as costs collected by him, in their behalf, on divers *fi. fas.* set forth in said rule. Roberts failing to comply with this order was, on the 23d day of June thereafter, committed, under process of attachment, in the name of the State, to the common jail of the county, by John W. Maltbie, the present Sheriff.

At the September term, 1846, Maltbie was called on to return said attachment into court with his actings and doings thereon, together with the body of the said Roberts.

He returned: That he had taken Roberts into custody, and confined him in the county jail, and that, on the night of the 15th of August, he had escaped therefrom, without his permission and by no negligence on his part or on the part of the jailor.

The clerk and plaintiffs in execution proposed to controvert the return, and to prove that the sheriff suffered Roberts to go at large in all the rooms of the prison, with a full knowledge that there was a breach in the walls of one of them, through which the said Roberts could and did escape.

Maltbie refused to join issue on said statements, and denied the right of the party to traverse his return; and this objection was sustained by the court.

It was then urged that the sheriff was liable by rule, on his own showing, for the amount due on the attachment. But the court held otherwise—Judge Dougherty presiding. And further, that it was unnecessary to form the issue, as, in his opinion, the allegation on the part of the clerk and plaintiffs, suggests *new facts*, which, if true, make a case where the parties ought to be turned over to their remedy by action, for an escape, and not make the sheriff responsible by rule for a contempt of the court. Whereupon the clerk and plaintiffs in execution excepted, and contend that the judgment below ought to be reversed.

1st. Because the court determined that the parties in interest had no right to controvert the return of the sheriff, and refused to permit them to do so.

2d. Because the court decided that Maltbie, the sheriff, was not liable, under the rule, and upon the showing made by him.

3d. Because the court held that, admitting the facts suggested in the issue tendered to be true, the parties' remedy was by action for an escape, and not by attachment.

1st. Is the return of the sheriff traversable? The act of 1840 is exceedingly broad. It declares that: "Whenever any sheriff, constable, coroner, or justice of the peace, shall make a return, or showing, under, or by virtue of, any rule, or order, of any judge of any superior court of this State, the same shall be made on oath, to be taken at the time of making such return or showing; and the party calling for such return or showing, shall be at liberty to traverse the truth of such return or

showing, and upon such traverse an issue shall be formed, and tried by the jury, as in the case of other traverses."—*Hotchkiss*, 527.

This statute needs no comment. It applies to every return or showing made by any sheriff, under, or by virtue of, any rule, or order of any judge of any superior court of this State, and secures to the party calling for such return or showing, the right to traverse the truth thereof. If this act, therefore, is valid, the decision below is unquestionably wrong, for they are in direct conflict with each other.

The only objection raised to the law is, that it is supposed to interfere with that provision of our State constitution which declares, *that trial by jury as heretofore used in this State, shall remain inviolate*. Far be it from us to wish to curtail or abridge the right of trial by jury, believing, as we do, with the great commentator on the common law: that the more it is searched into and understood, the more it is sure to be valued. And with the Virginia bill of rights: that in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred. That provision in *Magna Charta*, that no freeman shall be hurt in either his person or property, "*nisi per legale iudicium parium suorum*," but by lawful judgment of his peers, deserves to be written in letters of gold; and is justly esteemed an inestimable privilege in all civilized countries. Of so high and beneficial a nature is this right that the 7th article of the amendments to the Constitution of the United States enacts: "That in suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." And in the second section of the 3d article of the original instrument it is declared, that "the trial of all crimes, except in cases of impeachment, *shall be by jury*."

With these great fundamental provisions staring him in the face—guarding and protecting this principal bulwark of English and American liberties—that judge must be endowed with no ordinary degree of hardihood, who would disregard—much less seek to infringe—the right of trial by jury. In maintaining, however, the constitutionality and expediency of the act of 1840, we repudiate any such imputation. On the contrary, it expressly guaranties this right; and while, by the rules of practice, no appeal is allowed in collateral issues, still the court has the power, in its discretion, to grant new trials *toties quoties*, upon such terms as shall appear just and reasonable. The constitution of 1798 does not say, that all cases, in which the right of trial by jury exists, shall be commenced by petition and process, as ordinary suits are, and that six months shall intervene between the docketing and the trial term, and that there shall be *first* a trial before a petit, and then a special jury. If this were so, then would all of our railroad charters be void; for they only allow to the landholder an appeal to a special jury, from the assessment of the commissioners; when, before and since the adoption of the constitution, he was entitled to institute his action of trespass or ejectment against all intruders, in the usual way. I am persuaded that a rule of construction, fraught with the mischievous consequences attendant on that contended for, never can be right.

And while it is a clear position, that if a legislative act oppugns a constitutional principle, the former must give way, and that in every such case it will be the duty of the court to declare the statute null, on the score of repugnance. Still, before the court will be justifiable in doing this, the opposition between the constitution and the law must be plain and palpable. And such, we humbly conceive, is not true in the present case.

2d. We are rather inclined to maintain the correctness of the judge's charge, upon the second assignment; and to hold that Maltbie was not liable to an attachment, upon the showing made by him—that Roberts, the former sheriff, escaped from custody, without his permission, and without any negligence on his part.

3d. The next and only remaining question is: whether, admitting the facts suggested in the issue tendered, to be true, the parties' remedy was not by action for an escape, and not by attachment. What are these facts? *That the sheriff, Maltbie, permitted Roberts, who was in custody, under process of attachment, to go at large in all the rooms of the jail with a full knowledge that there was a breach in the walls of one of them, through which the said Roberts could and did escape.* The judge below suggested that these allegations presented new facts. We do not think so. They only deny the truth of the sheriff's return, and do more than the law required, by specifying wherein it was false. But the main inquiry is; conceding them to be true, and to be so found by the verdict of the jury, upon the issue which was tendered, did it make such a case as would justify the court in granting an attachment? We hold the affirmative of this proposition.

The judiciary of 1799 declares that the sheriff shall be liable either to an action on the case, or an attachment for contempt of court, *at the option of the party*, whenever it shall appear that he hath injured such party, either by *false returns*, or by neglecting to arrest the defendant, or to levy on his property, or to pay over to the plaintiff, or his attorney, the amount of any sales which shall be made under, or by virtue of, any execution, or any moneys collected by virtue thereof."—*Prince's Digest*, 431, sec. 50.

This statute alone, unsupported by anything else, would be conclusive upon the point: for if the facts tendered in the issue were true, Maltbie had certainly made a *false return*, to the injury of the party. Moreover, if the act subjects the sheriff to an attachment, for *not arresting the defendant*, or for *neglecting to levy on his property*, much more will it adjudge him amenable to that process, for willfully suffering the defendant to escape, when in his custody under an attachment.

But it will be found, we apprehend, that this enactment confers no new rights or remedies, but is declaratory only of the law, as it then stood. It is the duty of a sheriff, and of *every other officer*, to discharge with fidelity, and to the utmost of his ability, every obligation incumbent upon him. His conscience and oath of office bind him to this extent. If he is delinquent, he incurs a double liability, namely, to the State and to the party injured. With proceedings at the instance of the public, we have nothing to do in this investigation, except to remark that whenever a rule is moved for, an attachment being of a *quasi* criminal nature, it is in the name of the State. As to the redress of individuals for official default

the doctrine and distinction—as laid down in Bacon and other elementary writers, and illustrated by the adjudicated cases in Westminster Hall and our own courts—seem to be this: where the sheriff has been willfully negligent, and obviously refuses to do his duty, the court, in the administration of summary justice, will punish by attachment. It is the duty of courts to see that no abuses are committed by their own officers, which are calculated to bring disgrace on the courts themselves. If a sheriff therefore refuse to serve a writ, or to do so unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his person or effects, or in order to prevent the service of any writ, the court which awarded it may punish such offences in such manner as shall seem proper, by attachment.—*Hob.* 62, 264; *Noy*, 101; *F. M. B.* 38; *Finch*, 237; 1 *Bla. Rep.* 6.

If, however, there has been no circumstance of obstinacy or willful negligence, it seems not usual to proceed in this manner, but to leave the party to his ordinary remedy against the sheriff by action.

Can any one doubt for a moment under which of these heads the present case falls, when the prisoner is in custody of the sheriff, under process of attachment for contempt, and he pretendingly confines him in a jail, *knowing* that there is a hole in the wall through which he could and did escape; and when, too, it is recollected, that he had the authority under the law to remove him to some safe jail in the adjoining counties? We are aware that much is left to the discretion of the courts in these cases: and *that* consideration has been pressed upon us with all the zeal which the occasion demanded. Under the act creating this court, however, we cannot hesitate to control that discretion, whenever in our opinion it has been illegally and improperly exercised.

In this State, under the act of 1840, there is really no excuse for turning over parties to their remedies at law. If the facts admitted in the return are plain, the court will proceed at once to judgment; if they are intricate and difficult, or disputed, an issue is formed and submitted to a jury, when an opportunity is afforded of fully investigating all the facts and circumstances agreeably to the rules of law, and where each party will have justice meted out to them by the country. If the finding is for the officer, the motion against him will of course be arrested. If against him, he is then called on to comply with the order of the court, or be guilty of a contempt for disobedience to its pronounced judgment, for which an attachment will lie.

An attachment sued out against the sheriff is carried to the coroner, who ought duly to return the same, and pay the plaintiff his debt and costs; *but if the coroner does not return an attachment of contempt against the sheriff, the way to compel a return is to move for an attachment against the coroner, directed to elisors.* The coroner of Middlesex not having returned an attachment of contempt against the sheriff, the court granted a peremptory rule (in the first instance) for an attachment against the coroner, directed to elisors, pursuant to the precedent in *Andrews vs. Sharp*, *Black. Rep.* 911; *The King vs. Packham and Cluske*, 2 *Black Rep.* 1218. In *Ibbotson vs. Tindall*, 8 *Eng. Com. Law Rep.* 279, where the defendant was already in custody when the plaintiff's *capias* issued against him, and afterwards escaped, the court refused to set aside an attachment against the sheriff, for not bringing in the body, and to drive the

plaintiff to his action against the sheriff, which was moved for on the ground, *that the sheriff having taken no bail bond, ought not to be responsible summarily by attachment.* In this case a writ of *habeas corpus* issued out of the Court of Exchequer, directing the sheriff to have the body of the defendant before a judge at chambers for the purpose of showing cause why he should not be discharged on the extent in aid; the jailor, or some other person deputed by him, accompanied the defendant for this purpose to London, *where he escaped without the knowledge, consent or participation of the sheriff or under-sheriff as it was averred in the under-sheriff's affidavit.* The plaintiff then ruled the sheriff to bring in the body. At *Michaelmas Term*, Vaughan, sergt., obtained a rule *nisi* calling upon the plaintiff to show cause why the sheriff should not be at liberty to amend his return on the writ of *capias*, by striking out the return on the writ, and returning according to the fact, "that on the receipt of the writ of the sheriff, the defendant was in custody at the suit of other persons; and from thence, until and at the return of the writ, at the suit of other persons than the plaintiff; but the court, upon cause shown, thinking the first return substantially correct, and that the amendment was only prayed with a view to exonerate the sheriff, discharged the rule. The plaintiff having then sued out an attachment against the sheriff for not bringing in the body, Vaughan, sergt., obtained a rule *nisi* to set aside the attachment, on the ground that the *sheriff was innocent of this escape*, and that at all events, he ought not to be responsible, because the defendant, being in custody when the plaintiff's *capias* issued, the sheriff could take no bail bond for his security; but if the attachment were set aside, the plaintiff might bring his action against the sheriff for the escape, in which case the amount of the damages might be inquired into, and the sheriff be thereby enabled to have his remedy even against the jailor in case a verdict should be obtained against him. *But the court thought that no ground had been shown for thus interposing in his favor, and discharged the rule.*

Here it will be perceived, that the prisoner was removed to London under a writ of *habeas corpus*, and that while there, he escaped, *without the knowledge, consent or participation of the sheriff or under-sheriff*, still the court refused to dismiss the rule for an attachment, and leave the party to his action; whereas, in the case under discussion, it was proposed to prove, that the prisoner escaped by the willful neglect of the officer. Indeed, so far as his legal liability was concerned, he might just as well have left the jail-door open. Public policy forbids that the laws of the land should be relaxed in favor of sheriffs and other ministerial officers. If they are prompt and punctual in the performance of the duty required of them, they have nothing to fear. If, on the other hand, they willfully and designedly offend against the laws of the country, and the process of the court, they cannot complain of being visited with the appropriate penalties.

The judgment below must therefore be reversed; and this is the unanimous opinion of the court.

No. 79.—JOHN E. PLEDGER and MATILDA PLEDGER, his wife, plaintiffs in error, vs. MIDDLETON HATHCOCK, defendant in error.

To call a woman a whore in this State is actionable.

This was an action of slander, tried before Judge Wright, in the Superior Court of the county of Floyd, at April Term, 1846.

The defamatory words charged in the declaration of the plaintiffs in error, who were plaintiffs below, were that the defendant, addressing one Newell Anderson, said, "*Have you heard of Matilda Rheedy*" (meaning Matilda Pledger, formerly Matilda Rheedy) "*and Micajah C. Martin whoring of it?*"

Upon the trial the counsel for the defendant demurred to the declaration, on the ground that the words charged were not actionable, which demurrer was sustained by the court, and a nonsuit awarded.

To which decision the counsel for the plaintiffs in error excepted.

N. L. HUTCHINS and WILLIAM MARTIN, for the plaintiffs in error,

Insisted that the words amount to a direct charge that the plaintiff, Matilda, had been and was guilty of whoring, and cited the following authorities:—1 *Com. Dig.* top page 385, 386, (E 1,) (E 2,) and cases there referred to. "*Did you not hear A state, &c.?*" To this position the counsel did not object, but assumed the broad ground that to call a woman a whore, and to say that she had been guilty of whoring, was not actionable.

The counsel for the plaintiff in error maintained that such a charge is actionable, and cited the following authorities:—

The rule is, that if the words charged were true, the party would be subjected to an indictment for a crime involving moral turpitude, or be subjected to infamous punishment—they are in themselves actionable.—*Brooker vs. Coffin*, 5 *Johns. Rep.* 191; *Martin vs. Stilwell*, 13 *Johns. Rep.* 275. Adultery and fornication are punishable by law.—*Hotchkiss*, 742, sec. 89.

If the words fairly import the charge of a crime, and would be so understood by mankind, the injury is inflicted on the character of the plaintiff as completely and amply as if the crime had been imputed in the most direct and positive terms, and the plaintiff is entitled to a remedy.—*Woolnoth vs. Meadows*, 5 *East*, 463; 2 *Lord Rayd.* 959.

JOHN W. H. UNDERWOOD, for the defendant in error, insisted that the words charged in the pleadings are not actionable *per se*, and cited the following authorities:—*Tomlin. Law Dic.* vol. 1, pp. 31, 32, 33; 4 *Rep.* 15; *Dow*, 81, 92; *Doug.* 389; *Burrow*, 2032.

By the Court—WARNER, Judge.

There was a demurrer to the declaration in this case, upon the ground the words alleged to have been spoken by the defendant were not actionable. If the laws of the country did not protect female character from such slanderous imputations, we should deeply regret it. In actions for slander we understand the rule to be, that the words alleged to have been spoken are to be taken in that sense which is most natural and obvious, and in which those to whom they are spoken will

be sure to understand them.—*Starkie on Slander*, 49, 50, 51, 52. Applying the words alleged in the declaration to this test, we can entertain no doubt as to their import and meaning. By the 5th section of the 10th division of the penal code, it is declared, any man or woman who shall commit adultery or fornication, or adultery and fornication, shall be severally indicted, and punished by fine or imprisonment at the discretion of the court.—*Prince's Dig.* 646. The law presumes a loss to the plaintiff from the publishing the slanderous words, when a person is charged with the commission of a crime.—*Starkie on Slander*, 12; *Martin vs. Stilwell*, 13 *John. Rep.* 275.

The reason given why the words in this declaration have not been held actionable in Great Britain is, that such defamation is only cognizable in the spiritual courts, and not punishable by the temporal courts; although in *Jones vs. Herne*, Chief Justice Willes said, if it was now *res integra* he should hold calling a woman a whore in public company was actionable.—*Starkie on Slander*, 24, 25. To impute incontinency to a female in London is actionable, because by the custom of the city she is liable to be carted for the offence.—*Starkie on Slander*, 27. As we have seen by the penal code of this State, the offence of adultery and fornication is indictable and punishable in the temporal courts, and, consequently, to charge a person with either offence is actionable. Let the judgment of the court below be reversed, and the cause reinstated.

No. 80.—THE ADMINISTRATORS OF JAMES M'CLESKEY, plaintiffs in error, vs. WASHINGTON LEADBETTER, defendant in error.

Where cross-interrogatories have relation to the subject matter of the direct examination, and the commission is returned with the cross-interrogatories, or any one of them, unanswered, the whole of the testimony ought to be withheld from the jury.

A party claiming under a grantor, as distributee or legatee, cannot impeach his deed for want of consideration, or because it was intended to defraud creditors. Both the grantor and his privies are estopped from denying it.

A deed which recites a former deed and its loss, is evidence of the first deed, and the grantor and his privies are bound by the recital.

A deed or other instrument in writing, more than thirty years old, need not be proven, but is admitted in evidence as an ancient document, provided its genuineness be satisfactorily established.

This was an action of trover for several slaves; verdict for the defendant in error, who was the plaintiff below, and motion for a new trial overruled. Tried before Judge Dougherty, in the Superior Court of the county of Hall, at March Term, 1846.

For the facts of the case, the grounds of the motion for a new trial, and the errors assigned in the decision of the court below, the reader is referred to the opinion delivered by the Supreme Court.

JUNIUS HILLYER, JNO. W. H. UNDERWOOD, and BASIL H. OVERBY,
for the plaintiffs in error.

NATHAN L. HUTCHINS, H. and T. R. R. COBB, JAMES P. SIMMONS,
and ——— PEEPLES, for the defendant in error.

By the Court—NISBET, Judge.

In this action of trover for certain slaves, Amy and her children and grandchildren, the plaintiff introduced in evidence, a bill of sale from Drury Leadbetter, dated in 1790, to one Buckner Harris, conveying certain slaves, and among them Amy, to said Harris.

He farther introduced, in evidence, an instrument in writing, bearing date in 1804, signed by Buckner Harris, and attested by two witnesses, one of whom signed officially, as a magistrate; which instrument appears, from the record, to have been recorded on the books of Green county Superior Court, but at what time, not disclosed. This instrument recites, or rather purports to certify, that the maker, Buckner Harris, did, several years before, convey to the plaintiff, Washington Leadbetter, by way of deed of gift, two negroes, to wit, Amy and Melinda, and that the title to said negroes was vested in him, as appeared from the records of the clerk's office of Wilkes county. After which certificate or recital, the instrument proceeds as follows:

"Now be it known to all persons, that whereas the said deed of conveyance is represented to me as being lost or mislaid, so that the said Washington Leadbetter cannot establish his title to said negroes, I do, by these presents, continue to relinquish to the said Washington, all and singular such title as may remain in me, reserving the service of said negroes for his mother, during her natural life, as also to confirm any other agreement they may choose to enter into."

The record shows farther, that the wife of Drury Leadbetter, (he having died shortly after the date of the bill of sale to Buckner Harris,) and who is the mother of the plaintiff, intermarried with James M'Cleskey, the defendant's intestate. All the negroes mentioned in the bill of sale from Drury Leadbetter to Buckner Harris, were, after the death of the former, sold under execution as his property, except Amy, who fell into the possession, at the sale, of Mrs. James M'Cleskey, then the widow of Drury Leadbetter. Amy remained in possession of James M'Cleskey and his wife, until Mrs. M'Cleskey died, when this action was brought against James M'Cleskey for Amy and her descendants, some 8 or 10 in number. James M'Cleskey dying, his representatives were made parties.

The plaintiff below farther proved the repeated admissions, for a series of years, of James M'Cleskey and his wife, that the property belonged to the plaintiff, and that Mrs. M'Cleskey had only a life estate in it.

The defendants sought to defeat the plaintiff's title, by showing that the bill of sale from Drury Leadbetter to Buckner Harris was void; because given without consideration, and to defraud creditors, and possession in Harris did not accompany it. The defendants

also objected to the admission of the writing from Buckner Harris to Washington Leadbetter, because, as he alleged, it was no deed, nor the confirmation of one, and required its execution to be duly proven.

The interrogatories of one Williamson Leadbetter were read by the defendants, to prove that the bill of sale made by Drury Leadbetter to Buckner Harris was fraudulent, and the interrogatories of one Strickland were tendered by the plaintiff to impeach the credibility of Williamson Leadbetter. In the direct examination of Strickland, he was asked to relate what he had heard Williamson Leadbetter say, about making fifty dollars for swearing in the case for M'Cleskey. To which question Strickland answered, that he heard Williamson Leadbetter say, whilst speaking of his testimony in this suit, that fifty dollars was better than nothing.

Upon the cross-examination, the witness was asked, "From whom did he (Williamson Leadbetter) say he was to receive fifty dollars, or any other sum, for the testimony?" Which last cross-interrogatory was not answered, and the admission of the whole of Strickland's evidence was excepted to on that ground. The court overruled the exception and admitted the interrogatories.

Such are the facts in this case, which appear to us be necessary to a clear understanding of the points made in the assignment.

Upon the trial, the court instructed the jury that the interrogatories of Strickland were admitted, because he did not consider the answers of Strickland on the subject of what Williamson Leadbetter had said about the fifty dollars, as impeaching the credibility of Leadbetter.

Also, that the defendant could not impeach the deed or bill of sale from Drury Leadbetter to Buckner Harris for fraud, or for want of consideration; that it was binding on Drury Leadbetter, and all claiming under him as distributees or legatees; that he could not take advantage of his own fraudulent intent; and that if the jury believed that the defendant held the negroes under him as a distributee or legatee, he could not set up the fraud of said Leadbetter in avoidance of the deed. That the paper purporting to be a bill of sale from Buckner Harris to Washington Leadbetter, vesting a life estate in Mrs. M'Cleskey, was but a declaration of what he before had done; that such declaration was no legal evidence of his having done the thing; that such declaration would bind Harris as an admission, but as between other parties, it was not binding as evidence that he had executed a good and valid bill of sale; that if the latter clause should be considered as a conveyance, the whole instrument must be considered; and if the first part of it should be considered as a deed or confirmation, it also showed that he had before executed a deed conveying an absolute and unqualified estate to plaintiff, without any reservation of a life estate to his (plaintiff's) mother. That if the deed had been made as recited in the instrument, its loss did not divest the title to plaintiff, and revest it in Harris; and therefore, in 1804, Harris had no title to convey to any one, much less could he, by the paper in evidence, create or convey a different estate from that created and conveyed in his first deed; and consequently, the paper under consideration could not operate as a deed of conveyance creating a life estate in Mrs. M'Cleskey, and at her death remainder to the plaintiff.

The learned judge gave other instructions to the jury, which, as th-

were not made the ground of error, are not here repeated. Under the charge of the court, the jury found a verdict for the plaintiff. Whereupon, the defendant moved a rule for a new trial, which being refused, he brought his writ, assigning as follows, to wit:

1st. That the court erred in permitting the instrument executed by Buckner Harris to plaintiff, to go as evidence to the jury.

2d. In permitting the interrogatories of Strickland to be read to the jury, when a material cross-interrogatory was not answered.

3d. In charging the jury that the defendants below could not impeach the deed from Drury Leadbetter to Buckner Harris for fraud, or want of consideration, or because Harris never had possession of the property mentioned in the deed.

Thus, with wearisome but necessary tediousness, have we arrived at the points in this case, for the judgment of this court.

We shall consider the 2d error first. On principle, we think the interrogatories of Strickland ought to have been rejected, upon the ground that the cross-question was not answered.

It is a power incident to courts of justice, in cases where a witness resides abroad, out of the jurisdiction, and refuses to attend, or is sick and unable to attend, to cause his testimony to be taken, by order, or commission for that purpose. The commission to take the depositions of a witness thus situated, is accompanied usually by interrogatories, filed by the parties on both sides.—*Greenleaf*, 387–8–9, and authorities cited in note on page 388. As, however, difficulties lay in the way in England, of the enforcement of a witness to answer, by courts of common law, the whole matter was regulated by acts of Parliament.—13 Geo. 3, and 1 Wm. 4.

At common law, and by statute, the right of cross-examination is studiously maintained.—*Tidd Prac.* 809–10–11.

The power of issuing a commission to take depositions, is incident to courts of common law, in this country, as in England; but the manner in which it is to be exercised and enforced in the States is variously prescribed by statute. By act of the General Assembly of the State of Georgia, of February 1799, (*Prin.* 425,) it is enacted, that “where any witness resides out of the State, or out of any county, in which his testimony may be required in any cause, it shall be lawful for either party, on giving at least ten days’ notice to the adverse party, or his or their attorney, accompanied with a copy of the interrogatories intended to be exhibited, to obtain a commission from the clerk of the court in which the same may be required, directed to certain commissioners, to examine all and every such witness or witnesses, on such interrogatories as the parties may exhibit,” &c.

By this act, notice is to be given to the adverse party, with a copy of the interrogatories in chief to be exhibited; obviously with a view to the right of cross-examination.

Farther: by this act it is made the duty of the commissioners to examine the witness on such interrogatories as the parties may exhibit. Such examination thus taken may be read on the trial, on the motion of either party. The right of cross-examination, and, by all necessary implication, of having the cross-questions answered, is thus secured. If the examination not taken as the statute directs—that is, among other things, if

the questions of both *parties* are not answered—it shall not be read at the trial. This conclusion, if it needed it, is strengthened by the provision which our laws make for compelling a witness to answer.—*Hotchkiss*, 584-5.

It is scarcely necessary to remark that these statutes do not repeal the rules of law which regulate the admission of evidence. For example, they do not repeal the common law, as to what is the manner or extent of the cross-examination. Aside from our own statutes, the general rule at law is, that no evidence shall be admitted, but what is or might be under the examination of both parties.—*Greenleaf*, 620, sec. 554; 1 *M. and S.* 4, 6; *McCl. and Y.* 160; 3 *Summ.* 98, 104-5; 1 *Starkie*, 270-1.

This rule does not mean that the party suing out the commission shall be deprived of the benefits of his witness's testimony, by failure of the other party to exercise the privilege of cross-examination, or by the dereliction of the commissioners, or the contumacy of the witness; but it does mean that a party, seeking the privilege of cross-examination, shall not be forced to trial without it. It certainly does mean that interrogatories ought not to be read, where cross-questions are filed and unanswered, provided they are such as, by law, ought to be answered, until the processes of the court are exhausted to compel the witness to answer.—*Greenleaf*, 621; 2 *M. and Rob.* 207.

I have been thus particular in planting the power of cross-examination upon a foundation, laid in authority, because of the sacred character of the right. The power of cross-examination is the most efficacious test which the law has devised for the discovery of truth. Without it *viva voce* examinations, and more particularly examinations by commission, would be very unsafe: the ingenious witness, or still more ingenious examiner in chief, might easily evade the truth, and at the same time avoid the pains of perjury. The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion, and interest, in which it is often hid, is among the very strongest bulwarks of justice. By means of it "the situation of the witness with respect to the parties, and to the subject of litigation; his interest, his motives; his inclinations and prejudices; his means of obtaining a correct and certain knowledge of the facts to which he bears testimony; the manner in which he has used those means; his powers of discernment, memory and description; are all fully investigated and ascertained, and submitted to the consideration of the jury."—*Greenleaf*, sect. 446.

Let us inquire, now, whether the case before us was such a one as, according to the law of evidence, required the withholding the interrogatories from the jury.

It will be remembered that the defendant in the court below had examined a witness, Williamson Leadbetter by name, to prove that the deed from Drury Leadbetter to Buckner Harris was void. The plaintiff sued out a commission to examine Strickland, and, among other things, for the purpose of impeaching the credibility of Williamson Leadbetter. To do this, one of the questions in chief is the following: "Relate what you have heard him, the said Williamson, say about making fifty dollars, by swearing in the above case for McCleskey, the defendant?" The cross-question elicited by this question in chief, and which was not answered, is the following: "From whom did he say he was to receive?"

fifty dollars, or any other sum, for the testimony?" The answer to the direct question is: "I heard him, Williamson Leadbetter, say, while speaking of his testimony in the above suit, that fifty dollars was better than nothing."

The rule as to what cross-questions may be put is this, to wit: a party has no right to cross-examine any witness, except as to facts and circumstances, connected with the matters stated in his direct examination.—14 *Peters' Rep.* 448-461.

It is true that a party may call a witness, and if he does not examine him in chief, the opposite party may swear him on his account, and examine him generally. How far the examination of a witness by commissioners, under our statute, makes him a witness generally for both parties, we need not decide, being willing to rest this case on the strict rule as to cross-examination, laid down by Mr. Justice Story, in 14 *Peters*.

The object of the direct question is to prove, by Williamson Leadbetter's own statements, that he had received money to testify in the case, and thus to destroy or weaken his credibility with the jury. The answer is, that witness heard him say, in speaking of his testimony, that fifty dollars was better than nothing. Now, judging of the cross-interrogation, by the direct question and its answer, we believe that it must be held to relate to a *fact or circumstance*, connected with the matter stated in the direct examination. The matter stated is, the making of fifty dollars by swearing; the circumstance or fact connected with it, is the *person* from whom he received it. The connection is plain.

Now, how far the answer of the witness, to the question propounded in the direct examination, did, in fact, impeach the credibility of Williamson Leadbetter, is not our province to determine; nor was it the province of the court below to determine. It is the right of the jury, and their right exclusively, to pass upon the meaning and effect of the testimony submitted to them. Nor can we or the court below determine how far the answer of the witness to the cross-question, would have modified the meaning and effect of his answer to the direct question. We are convinced that the party had the right to have the circumstances under which Williamson Leadbetter made this statement explained; and having cross-examined the witness with this view, and the commission having been returned into court with this question unanswered, it was the duty of the court to have withheld the interrogatories from the jury.

But we are unwilling, notwithstanding, to send this cause back upon this ground. This error is assigned on a refusal of the court below to grant a new trial. New trials are within the sound legal discretion of the court. We shall not, except in plain and strong cases, interfere with the exercise of that discretion. Notwithstanding the error (as we believe it to be) of the court, in admitting the testimony, yet we can readily believe that, in this case, the jury might have found as they did, had it been rejected. Admitting the unimpeached truth of everything testified to by Williamson Leadbetter, yet the jury might have found as they did find. The courts will not set aside a verdict, on account of the admission of evidence which ought to have been rejected, provided there be sufficient without it to authorize the finding.—*Tidd*, 907; 1 *Taunt*, 12.

We are satisfied that there is no error, in the record, on the third ground of error. We are of opinion, with the court below, that a deed,

void as against third persons, is yet binding *inter partes*; and that it is also binding upon privies. No one can allege aught against his own deed; nor can any one allege anything against a deed, who sets up a claim under the grantor. Both the grantor and those who claim under him are estopped from pleading that his act is void, because a fraud on the law. It may be true, that the deed from Drury Leadbetter was a voluntary deed, without consideration, and made expressly to defraud his creditors; yet it is nevertheless true, that if the defendant did set up a claim to the property in question, as his distributee or legatee, he was estopped from so doing. Whether he did claim in that character or not, was very properly left to the jury.

There are some modifications of the general proposition asserted above: for example, one may attack the deed of a grantor, who claims under him, by *prior* deed. But the general principle, as applicable to the facts of this case, is true.—1 *Starkie on Evidence*, 369, note; 4 *Binney*, 231; 1 *Dallas*, 67; 3 *Mason*, 378; 2 *Rand.* 384; *Greenleaf*, 28; 9 *Cranch*, 43; 11 *Johns.* 97; 2 *Term Rep.* 171; 2 *Taunt.* 278; 2 *B. & A.* 367; 2 *Smith's Leading Cases*, 452.

In treating of the first assignment, which, for convenience, we make last in the series, it does not become necessary to give a construction to every part of the instrument made by Buckner Harris to the plaintiff below, Washington Leadbetter. The exception taken is to its admissibility generally; and in the argument, because its execution was not sufficiently proven. It was rightfully admitted as an admission against Harris, the maker. We also think it was evidence of the fact of a previous deed from him to the plaintiff, the execution and loss of which it recites. A deed which recites a prior deed is evidence of the first deed, and the grantor is estopped from denying it.

Although this paper is not a deed, yet the principle applies to this instrument, let its technical character be what it may.

Both this paper and the previous conveyance, to which it refers, are part of the plaintiff's title, and as such, were material to his case. As to what extent, together or singly, they prove a title in him, we are not authorized to say: of that the jury was the proper judge.

In regard to the rule, that the recital in a deed of the execution of a previous deed is evidence of the fact, and binding upon the party making it, and privies, see *Greenleaf*, 26, 27, sec. 23; *Willes*, 9; 6 *Peters*, 611; 4 *Peters*, 1, 83; 1 *Starkie*, 369; 6 *Mod.* 44; *Salk.* 285; 4 *Bing.* 231; 2 *Lev.* 108, 109; *Gilb. L. En.* 100; and particularly the case of *Carver vs. Jackson*, reported in 4 *Peters*, 1 to 87, where the whole doctrine is discussed with extraordinary ability by Mr. Justice Story.

This paper was properly admitted as an ancient document. The usual proof of execution was not necessary. In the nervous language of Buller, in *Rex vs. The Inhabitants of Farringdon*, (2 *T. R.* 471,) "It is an established rule, which holds, in case of every deed, that if it be above thirty years standing, it proves itself."

This document is more than thirty years old. We take the rule upon this subject to be this: "An ancient deed, by which is meant one more than thirty years old, having nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead; and if it is found in the proper custody, and is corroborated by ancient o

modern corresponding enjoyment, or by other equivalent or explanatory proof, it is to be presumed that the deed constituted part of the actual transfer of property therein mentioned."—*Greenleaf*, 173-4, sec. 142-3-4. They are to be considered as parts of the *res gesta*, from which we infer the whole transaction, *ex uno disces omnes*: or, to use the beautiful and apt illustration of Professor Greenleaf: "The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statute may be made out from an existing torso, or a perfect skeleton from the fossil remains of a part." It is necessary, however, to ascertain the *genuineness* of these ancient documents, for their value depends upon that fact. This may be shown *prima facie*, by proof that the document comes from the *proper custody*, or by otherwise accounting for it. Documents found in a place in which, and under the care of persons with whom, the care of such papers might naturally and reasonably be expected to be found, are in precisely the custody which gives authenticity to them.—*Greenleaf*, 172, sec. 142; 2 *Bing. N. C.* 163, 200, 201; 2 *Anstr.* 601; 3 *Taunt.* 91; 5 *Price*, 312; 1 *ib.* 225, 232; 2 *ib.* 303, 307; 4 *Wheat.* 213, 221; 9 *Peters*, 663-675; 5 *ib.* 319, 344; 3 *Johns. Cas.* 283; 5 *Cowen*, 221; 7 *Wend.* 371; 2 *Nott and M'Cord*, 400; 2 *ib.* 55; 2 *M. and Rob.* 240.

Now, for the custody of this document, there is no place provided by law; there is for such a paper no legal depository. The person interested in and claiming under it, is the person naturally and reasonably expected to keep it. So far as the record discloses the facts, it came out of Washington Leadbetter; it was found in his custody; he exhibited it in evidence, and he is the person who is named in it as the remainder-man. Who else should have it? or where would one go to find such a paper, but to him, of all the world most interested in it?

It is farther desirable, that there be proof of some act done in reference to the document offered, as further assurance of its genuineness; such as early possession and enjoyment, or modern possession and user. And in all cases where unexceptionable evidence of enjoyment, referable to the document, may reasonably be expected to be found, it must be produced.—*Greenleaf*, 173, sec. 143; 1 *Phil. Ev.* 277; 10 *B. and C.* 17.

In the case before us, the record shows possession in the tenant for life at a very early period, and down to her death, and the assertion of the plaintiff's claim immediately on her death. Also the suing out, by the plaintiff, of a process against the defendant, before the death of the tenant for life, to enjoin him from taking the property out of the jurisdiction of the court. So that this part of the rule seems to have been complied with.

Further evidence of its genuineness is found in the fact of its having been recorded, which, according to some of the authorities, dispenses with proof of possession, or other act of enjoyment referable to the deed.

A very grave question has been made, whether proof of possession is not indispensable; or whether its absence may be supplied by other satisfactory corroborative evidence—Chancellor Kent, sustained by many authorities, holding the former opinion. For this position, see 3 *Johns. Cas.* 283; *Coke Lit.* 6 b; 1 *Roll. R.* 132; *Skin.* 239; 2 *Mod.* 323; 110 *Black. R.* 532; 3 *Johns. R.* 292, 298. The latter proposition how-

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ever, seems to be sustained by more numerous, if not higher authorities, and is considered as the rule.

It is now agreed, that where proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances.—6 *Dow*, 202, by *Lord Eldon*; 9 *Ves.* 5; 2 *C. and P.* 440; 4 *Wheat.* 213, 221; 3 *Johns. Cas.* 283, 287; 5 *Cow.* 221, 225; 7 *Cow.* 431; 7 *Wend.* 371, 373-4: also the cases collected in *Cowen and Hill's notes to 1 Phil. Ev.* 477.

The principles stated apply to all documents or writings which convey rights of any kind, as well as to deeds and wills.—See 2 *T. R.* 470-71; 5 *T. R.* 412, in note; 4 *B. and Ald.* 376; 6 *Eng. C. L. Reps.* 452.

Let the judgment of the court below, for these reasons, be affirmed.

No. 81.—LORENZO D. DAVIS, plaintiff in error, vs. ALSEY B. BARKER, defendant in error.

An execution is valid, issued upon a confession of judgment, which appears on the writ, and which has been registered together with the declaration and judgment, upon the permanent records of the court, although the clerk has omitted to enter said confession upon the *minutes*.

An entry of confession of judgment, on the declaration of file in the clerk's office, is sufficient, in the absence of all proof, to discredit the memorandum, to authorize the court wherein it was made, to have it transcribed on its minutes at any subsequent term, in order to preserve their harmony.

No notice to the defendant is necessary, to warrant an application to the court, to enter said confession, *nunc pro tunc*.

Is it necessary that a confession of judgment, which is the act of the party only, should appear on the minutes? And can a claimant after issue joined, and a trial on the merits, except to the regularity of the previous proceedings in the cause? *Quere?*

For the facts of the case, and the errors assigned, the reader is referred to the opinion of the Supreme Court.

JOHN W. H. UNDERWOOD, and WILLIAM MARTIN, for the plaintiff in error, made the following points:

- 1st. Process may be amended by the instructions given the clerk;
- 2d. The plea roll may be amended by the imparlance roll;
- 3d. The verdict may be amended by the recollection of the judge;
- 4th. The judgment may be amended by another part of the record, if the judgment will be thereby affirmed;
- 5th. If important rights are likely to be jeopardized, amendments will be allowed, that would otherwise be refused;
- 6th. The record was sufficiently full, and ought to have been allowed to go to the jury;

And submitted the following authorities:—1 *Bac. Abr.* 154, 157, 1^r

164 to 167; 1 *Kinne's Comp.* 15; 1 *Hill's Rep.* 167, 209, 239; 2 *Hill's Rep.* 451, 476; *Schley's Dig.* 130, 136; 1 *Tidd's Prac.* 660-1-2; 1 *Jac. Law Dic.* 85 to 90.

H. and T. R. R. COBB, for the defendant in error.

By the Court—LUMPKIN, Judge.

An execution, issued from the Superior Court of Lumpkin county, in favor of Lorenzo D. Davis, against one Elias Turner, and was levied on two slaves, which were claimed by Alsey B. Barker. At March term, 1846, the cause stood for trial on the appeal—Judge Wright, presiding. The *fi. fa.* was offered in evidence and rejected by the court, and the levy ordered to be dismissed, upon the ground that the confession of judgment by the defendant had never been entered on the minutes of the court, although endorsed on the declaration, and enrolled with the other proceedings.

It was moved to have the confession entered *nunc pro tunc* and overruled.

At the adjourned term of the court in June, a new trial was applied for on the grounds, that the court had erred in repelling the execution, and in refusing the motion to supply the defect in the minutes. The application was denied, the court adhering to its former decision upon both points, whereupon, counsel for the plaintiff in execution excepted.

There is no complication in the facts of this case, and we will come, therefore, at once to the errors assigned to the opinion of the circuit judge.

Formerly, the rules of law were much more rigorous, with respect to amendments, than they are at present. The several statutes of *jeofails* show this: Edward 1, says Britton, granted to the justices, to record the several pleas, pleaded before them, but they were not to erase their records so as make them justify their own misdoings, *nor amend them*. And this ordinance, we are told, was so rigidly observed, that when Justice Hengham, in the reign of that monarch, moved with compassion for the circumstances of a poor man, who was fined 13s. 4d., erased the record and made it 6s. 8d., he was fined 800 marks, with which a clock-house, at Westminster, was built and furnished with a clock. As to the clock, however, it seems there is some incredulity growing out of a chronological difficulty, clocks not having been in use till a century afterwards.

Now, it is hard to prescribe a limit to the power and practice of the courts, in regard to amendments. Even as far back (1780) as *Ed-dowes vs. Hopkins*, (*Douglas*, 376,) Lord Mansfield said: "It was impossible to believe there was such an absurdity in the law, as that a mere mistake of the officer should be without a remedy." And he mentioned the case of one Gibson, who had been tried for robbing Mr. Francis, and convicted; and a mistake being discovered in the verdict, upon consultation with all the judges at his chambers, it was corrected from minutes signed by the jury, and the prisoner executed.

And in the case of *Mara vs. Quin*, 6 *Term Rep.* 1, the court, *forti manu*, with strong hand, allowed the judgment to be signed, filed, and docketed, of a day, two years in fact before it was obtained, *because it advanced*

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the purposes of justice. And Lord Kenyon, Chief Justice, made this memorable declaration: "The forms of the court are always best used when they are made subservient to the justice of the case."

In *Mechanics' Bank vs. Minturn*, 19 *John. Rep.* 244, the clerk of the court of the interlocutory judgment against the endorser, made a mistake in the assessment of damages, by calculating the interest for one year less than the actual time, and the attorney of the plaintiff, without observing the mistake, filed the report of the assessment and entered final judgment thereon, and on receiving payment of the amount and costs acknowledged satisfaction, which was entered of record. Upon the payment over of the money to his client, the mistake was detected, but the defendant refused to rectify it. The court, on motion for that purpose, ordered the entry of satisfaction of the judgment, and all proceedings in the cause, subsequent to the interlocutory judgment, to be vacated; and the report of the clerk of the assessment of damages, and the record of the judgment and the satisfaction thereof, to be taken off the files of the court, and canceled, and the damages to be re-assessed by the clerk, allowing the defendant credit for the amount paid by him.

In *Hancock's case*, 1 *Saund.* 336, note 10, it is laid down that if a judgment be entered *de bonis propriis*, instead of *de bonis testatoris, si, &c.*, it is considered as a mere clerical mistake, which the court below will amend on motion, even after the record has been removed by error, and argument had in the Court of Error.

The Court, in *Short vs. Coffin*, 5 *Burrow*, 2730, permitted a similar amendment. And Lord Mansfield, in delivering its opinion, called it a mere mistake of the clerk. And he cited the case of *Chapman vs. Gale*, 2 *Lev.* 22, where a like amendment had been allowed as a misprision of the clerk, upon the affidavit of the attorney, that he gave his clerk instructions to enter the judgment up according to the plea.

In *Close vs. Gillespey*, 3 *John. Rep.* 518, a judgment had been entered upon a warrant of attorney, and the same was regularly signed and docketed; but by the negligence of the attorney, the plea of the defendant was not signed, nor was the name of the defendant's attorney inserted in the record. The plaintiff was allowed to amend the record *nunc pro tunc*, though a subsequent judgment had been entered up against the defendant, in which a preference was claimed.

Here, it will be perceived that there was no regular judgment until the plea was signed. But the court, in furtherance of justice, made valid a proceeding which before was nugatory.

In affirmance of the judgment, (and it will be observed, that there is much more latitude and liberality displayed by the court, in allowing amendments which go to uphold judgments, instead of to defeat them; the judgment itself may be set right by another part of the record, in a fact which appears to be the misprision or neglect of the clerk, as in the mistake of the names of parties, and such like.

In debt against A, the judgment was *quod predictus B capiatur*, when it should have been *predict. A*; nevertheless, this shall be amended.—*Roll. Abr.* 337.

So in an action brought by Robert Meredith, and the judgment, as entered, was, *quod predict. Carolus Meredith recuperet*: the court held this

amendable, *being only the fault of the clerk*, the misprision being in the name which was right in the rest of the record.—1 *Bac. Abr.* 165.

The omission of the clerk to enter upon the minutes the confession of judgment, was clearly a mistake in the discharge of a mere ministerial duty; and I flatter myself that the authorities quoted show, most satisfactorily, that it is a power incidental to all courts, to correct the errors of their ministerial agents, to subserve the ends of justice. And if verdicts and judgments can be amended, and executions likewise, even after a sale under them by the sheriff; and that, too, *as of course*, and without a rule or notice to the defendant in execution, (1 *Hill Rep.* 245,) it follows, *a multo fortiori*, that it was competent for the court, in this case, to have ordered the confession to be inserted in its minutes, *provided it had been necessary*.

It is contended with great ingenuity, by the counsel of the claimant, (and if any one could sustain this decision it were he!—*Si Pergama dextra! &c.*) that there is no evidence of this confession to authorize this entry to have been made on the minutes. But if verdicts can be amended, and numerous precedents are found to that effect, from notes taken by the judge at the trial, by notes of counsel, and by affidavit of others, *from memory*, of what took place at the trial, (*Cro. Charles*, 338; *Buller's N. P.* 320; 1 *Strange*, 513; 1 *Salk.* 50, and 2 *Lord Raymond*, 895,) then I am clear, with all due deference for my brother Wright, that the endorsement on the writ, in this case, was enough to justify the order which was applied for in this case; and this writing might have been strengthened (if anything were wanted to strengthen it) by parol proof.

This paper was in the custody of the clerk, a sworn officer, and notwithstanding many of our clerks are negligent to a fault, in allowing all persons to have access to the records and papers of file, in their keeping, still, in the absence of all evidence calculated to cast suspicion upon this memorandum, I think we are bound to presume that it is the act of the defendant—his written acknowledgment that judgment shall be rendered against him for the amount therein stated.

The Court of Appeals in South Carolina, held that the entry of a nonsuit, *on the back of a declaration*, was evidence of the termination of that suit, at any rate in the court where the nonsuit was awarded.—*Baker vs. Dellesseline*, 4 *McCord's Rep.* 372.

It is suggested, in argument, that the rights of *third persons*, perhaps the claimant himself in this very cause, might be prejudiced by permitting the confession to be registered. As to the effect of this act, it is quite another thing. The only question before us is, as to the power and duty of the court to cure the omission apparent on its minutes, in order to preserve the symmetry of its proceedings. *For no other purpose do I deem this correction important*; and to attain this object, the minutes of a court are always subject to its control. Besides, this objection, if well taken, would virtually abrogate the right to amend verdicts, judgments, executions, or anything else, in any cause. The very application to amend is predicated upon the presumption, that the proceeding to which it refers is defective in something material; otherwise, it would be unnecessary to make it; and, of course, *somebody* will be affected by it. The first duty of courts is, upon application made, to *amend what is amiss* in their

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proceedings ; but in doing so, they will so shape their orders as not to work injustice to others.

A regular judgment of the court was signed by the attorney of the plaintiff, upon this confession. It was entered on the execution, an office-book open to the inspection of all, and a *fi. fa.* regularly issued thereon ; and the whole proceeding, not only of file in the clerk's office, but recorded upon the books kept for the registration of all the judicial proceedings of the court. We should be strongly inclined to hold that this was notice enough to *subsequent purchasers*, and all persons whatsoever.

The case of *Fugua & Hewitt vs. Carriel & Martin*, (1 Ala. Rep. 170,) shows that notice to the defendant was not necessary to authorize the court to correct its own minutes. And the authorities to this point might be multiplied to almost an indefinite extent. No notice is ever required where the error or oversight is apparent on the face of the papers themselves.

As this confession was the act of the defendant, and not of the court, we are by no means convinced that it was required to be put upon the minutes ; nor are we prepared to say that the objection, however fatal, if taken in time would be available, not only after issue joined on the claim, but after trial and verdict on the merits, and when the case was pending the appeal.

Judgment reversed.

No. 82.--LUKE ROBINSON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The common-law right of a prisoner to challenge a juror, "*propter affectum*," is not taken away by the act of 1843, prescribing the oath to be administered to jurors in criminal cases : that act only prescribes the *manner* in which the right shall be exercised.

If a prisoner desires the benefit of his right to challenge a juror, "*propter affectum*," he must, under the provisions of the act of 1843, ask the court for the appointment of triers for that purpose, in the manner pointed out by the common law.

When the property in a negro alleged to have been stolen, is charged in the indictment to be the property of the prosecutor, evidence that he was the purchaser of the negro, at sheriff's sale, under the incumbrance of a mortgage, after condition broken, as the property of the prisoner coupled with the lawful possession, was held to be sufficient to maintain the allegation.

This was an indictment against the plaintiff in error for the larceny of a slave named George, the property of Samuel Buffington, senior, who was the prosecutor, tried before Judge Merriwether, in the Superior Court of the county of Baldwin, at August Term, 1846, and which resulted in the conviction of the prisoner.

In the course of empanneling a jury, one Digby was called, and being sworn on his *voire dire*, he was asked the questions prescribed by the act of 1843, to wit : "Have you, from having seen the crime committed,

or having heard any part of the evidence delivered on oath, formed and expressed any opinion in regard to the guilt of the prisoner at the bar?" Which the juror answered in the negative. Then the further question was propounded: "Have you any prejudice or bias resting on your mind for or against the prisoner at the bar?" Which the juror also answered in the negative. Whereupon said juror was offered on the part of the State as competent, when the counsel for the prisoner, with a view further to test his competency, required that he should be asked the further question, whether "he had formed and expressed any opinion as to the guilt or innocence of the prisoner?" so as to ascertain whether the said juror had formed and expressed any opinion in regard to the prisoner's guilt or innocence from report or otherwise, which was objected to on the part of the State, and the objection sustained by the court. A jury of twelve was at length empaneled and sworn, to try said cause, upon the plea of "not guilty," whose qualification and competency were ascertained in the above manner.

Witnesses were then introduced in behalf of the State, who, among other things, proved that the boy George, with Edy, his mother, and several other slaves, was sold at Sheriff's sale, as the property of the prisoner, and the boy George and his mother Edy, and some others, were purchased at said sale, by the prosecutor, in the year 1842, and that George was worth about \$500. The boy was missing from the prosecutor's plantation about the first of March, 1846. That George was one of the negroes in controversy, in a suit pending in Baldwin Superior Court between Harper Tucker and the prosecutor, and that he had been levied on, after the prosecutor's purchase of him, by a mortgage *fi. fa.* in favor of said Tucker. As to the portion of the testimony on the part of the State, from which it is supposed the jury inferred the prisoner's guilt, there having been no objection to its admission, it is deemed unnecessary to state it here. The testimony in behalf of the State having been closed, the prisoner's counsel proposed to prove, that when the boy George was sold by the sheriff, he was sold subject to the mortgage of said Harper Tucker, for the purpose of showing that the property in said boy was not in the prosecutor, but in the prisoner, which the court refused to allow, on the ground that whatever title was in the prisoner when the boy was sold, passed to the prosecutor by that sale, as much so as if the prisoner had himself made the sale; and that it was not necessary that the prosecutor should have the absolute and entire property in the negro, to maintain the allegation in the indictment that the negro was his property.

It was then proven, on the part of the prisoner, by one Searcy, that prosecutor's son went for him to go with his dogs and catch two boys, Edward and the said George, that had run away from the prosecutor. Witness went and drove for them, and caught the boy Edward, and struck another track, and pursued it to the river, and down the river some distance. This was a day or two after the boy was missing. Witness did not see the place where the boy went into the river. A few days afterwards, the prosecutor sent for witness, requesting him to go and search for George. Witness went, but did not strike any track, and returned

The counsel for the prisoner then offered to prove the admission of the prosecutor, that the boy George, in all likelihood, was drowned

in the river at the time the boy Edward was caught, which being objected to, was repelled by the court, and the counsel were not permitted to put the question.

The counsel for prisoner then offered the mortgage *fi. fa.* in favor of Harper Tucker against the prisoner, which was levied on the boy George after the purchase of him by the prosecutor, with the levy and entry of "claim" by said prosecutor thereon, for the purpose of showing that the property in the boy George, at the time of the alleged larceny, was in the sheriff and not in the prosecutor, and thereby to disprove the allegation that he was the property of the prosecutor; which was repelled by the court upon the ground that the mere levy of the *fi. fa.*, without an actual sale under it, did not of itself divest the title acquired by the prosecutor, and the fact of such levy, if true, did not of itself counteract or negative the charge in the indictment, that the said negro George was the property of the prosecutor.

The counsel for the prisoner then tendered in evidence a paper for the purpose of negating the ownership of the prisoner, which, it was stated to the court by counsel, showed that a claim had been interposed by the prosecutor to the boy George when levied on by the mortgage *fi. fa.*, and that said claim had been withdrawn, and also the forth-coming bond of the prosecutor, by which he had the possession of said negro George at the time of the alleged larceny, which was rejected.

The counsel for the prisoner then offered in evidence a paper, which, they stated to the court, was a bill in equity filed by the prosecutor and Donald M'Donald, the purchasers at sheriff's sale of the mortgaged property, against said Harper Tucker, also a purchaser of another portion of the mortgaged property, for the purpose of compelling contribution between all the purchasers of the mortgaged property to the discharge of the mortgage, and enjoining said levy, the said bill being tendered to disprove the fact of property in the prosecutor. Which was rejected by the court.

To all which decisions of the court below the counsel for the prisoner excepted.

For the assignment of errors, see the decision of the Supreme Court.

KENAN & ROCKWELL, counsel for plaintiff in error.

MR. ROCKWELL argued as follows:

Trial is the investigation of the matter of fact in issue.

The question presented by this record is two-fold. First, as to the mode of examination. Second, as to the facts necessary to be examined.

The mode of examination of a matter of fact by a jury, involves the manner of empanneling that jury; for if the constituent members thereof be not such as the law regards fully competent to determine the issues before them, the jury is defective, and the result of the examination is void.

The grounds of challenge to the polls are ranged under four principal heads by Sir Edward Coke; the third of which, "*propter affectum*," is the one alleged in the assignment of errors to have been denied the prisoner by the court below, in determining the competency of the juror in this case.

This challenge is of two sorts: either working a principal challenge, or to the favor.

A principal challenge is, where there is express favor, or express malice.

The rule of law is, "that a juror must stand indifferent as he stands unsworn."—*Co. Litt.* 157, b. "*Omni exceptione major.*"

In an old case (1 *Bulst.* 20, cited in *Joy on Jurors*, 169,) upon a trial at bar, a juror was challenged that he had said to one of the parties, "Provide to pay, for if I am sworn I shall give my verdict against you;" he was found not to be indifferent and was withdrawn.

The older authorities in the English books seem to recognize the doctrine, that if a juror had formed or expressed his opinion *from his knowledge of the cause*, such an expression of opinion was not incompatible with his legal indifference; but if such opinion was expressed *without* any knowledge of the cause, it was considered as springing from ill-will or favor, and the juror was adjudged incompetent. Modern cases in the United States, professedly based on the common law, have much expanded the doctrine.

Although the doctrine, in its limited or more liberal application, will equally support the positions assumed in this record, it may not be amiss to consider the earlier decisions upon this question.

Fitzherbert (*Chall.* 22) reports the charge of Babington, J., to the triers in an old case, thus: "If he will pass for one party, whether the matter be true or false, he is favorable. So if he has said he will pass for one party, if it be for affection he hath to the person and not for the truth of the matter, he is favorable; but if it be for the truth of the matter that he has knowledge of it, he is not favorable."

In the Year Books, (7 *Hen.* 6. fol. 25,) the charge of the same judge to the triers, upon a challenge "*propter affectum*" taken in a replevin suit, is given thus: "You will inquire on your oaths, whether the cause be for partiality or affection (*pour l'affection*) that he has to the party, or for the knowledge he has of the matter in issue. If the cause is partiality for the party, then he is favorable; otherwise, not: and if he has more affection to one than to the other. But if he has a full knowledge of the matter in issue, and if he be sworn he will speak the truth, notwithstanding the affection he hath for the party, then he is not favorable."—*Joy on Jurors*, 203.

This appears to have been the earlier doctrine on this subject, and although in part overruled by subsequent decisions, was recognized in the case of the *King vs. Edmunds*, reported in 4 *Barn.* and *Ald.* 472, which was decided in Easter Term, 1821.

In the case of the *King vs. Edmunds*, Abbot, C. J., seems to have been of the opinion, that the declaration of a juror was not a good cause of challenge, unless it be made in terms, or under circumstances, denoting an ill intention towards the party challenging; and cites *Hawk. b. 2, ch. 42, sec. 28*, in support of the opinion. A reference to the authority, however, fails to support the decision to the extent stated. Considering the other questions presented in the case of the *King vs. Edmunds*, it decides, in effect, that you may not prove by the juror himself, his hostility to the party challenging; admitting, however, that such hostility if proved by other evidence, is a good ground of challenge.

The doctrine laid down by Babington, J., in the cases above quoted, underwent some modification in later times. Brook lays down the rule, that it is a good cause of challenge that a juror has reported, if he be empaneled, he will pass for the plaintiff—citing 21 *Hen.* 7, 29; (*Chall. pl.* 90.)

In the case of *Peter Cooke*, tried for high-treason, reported 13 *St. T.* 334, it was held not competent to prove by the juror himself anything which tended to his dishonor; and Treby, C. J., seemed to consider it a dishonorable thing to express *ill-will* towards a person accused of crime in regard to the matter of his accusation.

In all these cases the question asked of the juror was, directly, if he had not expressed his opinion *adversely* to the prisoner. But the question sought to be propounded in the court below to the juror in this case, might have been answered in the affirmative, without at all compromising the juror. Indeed, it seems to have been framed to avoid the perpetually embarrassing investigation, how far

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you might examine a juror on his "*voire dire*" without exposing him to discredit: he might have expressed an opinion as to the "guilt or innocence" of the person, without any feeling of *ill-will*, yet he might not, nevertheless, have stood *indifferent*.

Admitting, for the sake of argument, that you may not prove the juror's *ill-will* to the party challenging, by the juror himself, it is by no means clear that it was necessary according to the common law. Indeed, there is strong reason to believe otherwise. The ingredient of *ill-will*, superadded to the opinion formed, never was engrafted on the common law of England. It is expressly enacted in 25 *Edw.* 3, c. 3, which, Hawkins says, (vol. 2, c. 43, sec. 27) seems to be made in affirmation of the common law, "that no indictor shall be put on inquests upon deliverance of the indictments of felonies, or trespass, if he be challenged for that same cause by him which is so indicted."—*Schley's Dig.* 124. This statute may have been necessary, because of the application of the principle that the juror's knowledge of the cause would not render him incompetent; yet Breton, who wrote in the time of Edward 1, asserts that a defendant may challenge a juror because he was one of those who indicted him.

It is undeniably true, that the common law required a juror should stand impartial and indifferent between the parties; he should be without prejudice or bias for or against either; and jurors are examined as to this point without objection; nor has the question ever been considered in the least degree reflecting on their honor. But can a juror be deemed impartial or indifferent, who comes to the decision of the matter in issue with his opinion already formed; and, as far as he is concerned, his verdict already declared? If the trial by jury be the investigation of the matter in issue by twelve men whose opinions thereon are known and expressed before the investigation is commenced, then is this boasted bulwark of liberty worse than a mockery and a farce. The rules of the common law seem to require that a juror, to be competent to sit in a cause, should not have formed an opinion thereon, and most undoubtedly that such opinion should not have been expressed. Whenever such has been ascertained to be the fact, it has been repeatedly adjudged a ground of principal challenge.—*Trials per pais*, 222, 223; *Joy on Jurors*, 166; 7 *Cowen*, 128. In the court below, the prisoner was precluded from showing the existence of this fact, and restricted within the limitation that the opinion, if formed and expressed, should be based on *his knowledge of the cause*, derived from having seen the crime committed, or having heard the evidence on oath.

The courts in modern times, and particularly in this country, have gone farther than the courts of England to ensure the requisite impartiality and indifference of jurors. It has been ruled in accordance with the common-law right of challenge, that it is not necessary for the juror to have a fixed and definite opinion upon the matter in issue: it may be hypothetical; and this will constitute a ground of challenge, either principal, or to the favor, according to the circumstances under which it is expressed.—2 *Dev. & Batt.* 196, 224; 11 *Leigh*, 667; 14 *Wendell*, 131; 7 *Monroe, R. App.* 667; 7 *Cranch*, 297; 21 *Wendell*, 542; 6 *Cowen*, 557; 1 *Denio, R.* 308.

In the case of Hughes, *coram* Crampton, J., at the Armagh Summer Assizes, 1841, on trial for murder, the question asked the jurors was, "Have you any opinion with regard to the guilt or innocence of the prisoner?" One juror stated that at the previous trial he had expressed an opinion; he was objected to, and the objection was allowed.—*Joy on Jurors*, 191. So in Knapp's case, 9 *Pick.* 499. So in Polly Bodine's case, 1 *Denio, R.* 304.

The challenge "*propter affectum*" must be considered beyond all question as existing in Georgia as late as the 14th May, 1776, was not repealed at the time of the adoption of the Constitution, and consequently secured to the citizens by the terms of that instrument.

The mode of trying a challenge "*propter affectum*" was fixed by the Penal Code of 1833.—14 *Div. sec.* 48. "On all trials for crimes or offences on the criminal side of the court, where the punishment is death, or imprisonment and labor in the Penitentiary, any juror may be put on his *voire dire*, and the following question shall be propounded to him, viz: "Have you formed and expressed any opinion

regard to the guilt or innocence of the prisoner at the bar?" If the juror shall answer in the negative, then the following question shall be propounded to him: "Have you any prejudice or bias resting on your mind either for or against the prisoner at the bar?" And if the juror shall so answer these questions as to make him a competent juror, the State or the prisoner may nevertheless have the right to put such juror upon his trial in the manner pointed out by law, and to prove such juror incompetent.

This mode of ascertaining the incompetency of a juror was altered by an act of the Legislature passed in the year 1843, (*Cobb's Analysis*, 329,) which repealed the above section, and substituted in lieu of the first question the following, viz: "Have you, from having seen the crime committed, or heard any part of the evidence delivered on oath, formed and expressed any opinion of the guilt or innocence of the prisoner at the bar?"

It is material to observe, this last statute has restricted the expression of opinion by the juror to his *absolute knowledge* of the matter in issue. The authorities already cited establish a juror's knowledge of the matter in issue did not by the common law disqualify him from sitting in the cause, nor did it constitute a ground of challenge, either principal, or to the favor. If a juror had given a verdict before in the same cause, or upon the same matter between other parties, though a good cause of challenge, it could not be proved by the juror himself, *but by the record.*—*Joy on Jurors*.

The conclusions are deemed just, from a review of the authorities:

1st. That if a juror has formed and expressed any opinion upon the matter in issue, it is a good ground of challenge "*propter affectum*," according to the rules of the common law, and may be either principal, or to the favor; which may be proved by the juror himself when sworn on his "*voire dire*."

2d. That the first question required to be propounded by the act of 1843, if answered in the affirmative, will not elicit the proof that the juror may be subject to the challenge, "*propter affectum*," either principal, or to the favor, and is so far a restriction on the trial by jury as used in Georgia at the adoption of the Constitution.

The second branch of the argument will be devoted to the consideration of *the facts necessary to be examined*.

The allegation in the indictment is in substance as follows: charging that the prisoner "with force and arms, a certain negro slave of the value of \$500, then and there the property of Samuel Buffington, Sr., did steal, take and carry away." It is asserted, on the part of the prisoner, that he was at liberty to disprove this allegation by showing that the slave was not the property of Samuel Buffington, Sr.

The kind of property stolen must be accurately stated in the indictment.—3 *Chit. Crim. Law*, 947. The value also must be expressed, in order that it may appear on the face of the record, whether the offence is grand or petit larceny.—2 *Hale*, 182; 3 *Chit. Crim. Law*, 947.

Whenever the owner of the goods is known, the property must be expressly laid in him.—1 *Hale*, 512; 2 *Leach*, 578; 1 *Chit. Crim. Law*, 212; 3 *ib.* 948; 14 *Mass. R.* 217. A special property is sufficient.—3 *Chit. Crim. Law*, 948.

Such evidence as would defeat a recovery in an action brought by the person in whom the property is alleged, is competent to disprove the allegation in the indictment.

The prosecutor in this case could maintain no action to recover the property and reduce it to his possession, unless he had the legal title to, or the legal right to the possession of, the property alleged to be the subject of larceny.

The evidence in the court below, established the fact, that the sheriff had levied upon the slave; how he was left in the possession of the prosecutor, did not appear; and the prisoner, by the decision of the Court, was precluded from showing. If, however, the sheriff *legally* left the slave in the possession of the prosecutor, (as it is presumed in the absence of proof to the contrary,) the prosecutor interest in the negro; he was the mere servant of the sheriff, provided he
n to the property.—9 *Mass.* 104, 112, 265.

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What claim did the prosecutor have to the property, as disclosed by the testimony which was sought to be introduced by the prisoner, but repelled by the court?

The prisoner sought to prove that when the said slave was purchased by the prosecutor, he was sold at sheriff's sale under the incumbrance of a mortgage executed by the prisoner to Harper Tucker.

This leads to the examination of the nature of the property of a mortgagor of personal chattels in the things mortgaged.

A mortgage of personal property vests the legal title to the thing mortgaged in the mortgagee or the assignee, and he may bring trover after condition broken.—1 *Hill*, S. C. R. 291; 12 *Wend.* 61.

After the condition is forfeited, the mortgagee of personal chattels has an absolute interest in the thing mortgaged.—8 *John. R.* 76; 7 *Cowen R.* 290; 1 *Pick. R.* 289; 3 *Cowen R.* 200, n.; 4 *ib.* 461; 9 *Wend. R.* 80.

After a default in the payment of money secured by the mortgage, the title to the property becomes absolute in the mortgagee, and he or his representatives have a right to reduce it into possession.—12 *Wend. R.* 62. The right to reduce is a mere creature of equity, and governed by equitable rules.

In the case of *Thelusson vs. Smith*, (2 *Wheat. R.* 396,) involving the right of priority of payment secured to the United States by an act of Congress, Mr. Justice Washington holds this language: "If, before a right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fi. fa.*, the property is divested out of the debtor, and cannot be made liable."

This doctrine is also maintained in the case of *Conard vs. the Atlantic Insurance Company*.—1 *Pet. R.* 356. Mr. Justice Story in that case observes, "It is true that in discussions in courts of equity a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible."

It thus appears, that a mortgage of personal property conveys the legal title to the mortgagee. That after default in the payment of the debt secured by the mortgage, the property of the mortgagee in the thing mortgaged is absolute, unless there be something in our law that modifies or alters the law as recognized in the other States of the Union. It is submitted that the act of 1830, (*Prin. Dig.* 468,) recognizes and sustains the doctrines above asserted. It became then a material fact to ascertain if the property, when sold by the sheriff at public sale, was encumbered by a mortgage, in order to lay the ground-work of the evidence which would prove a title out of the prosecutor, and in the mortgagee.

The evidence was material in another point of view. It is alleged in the indictment that the slave was of the value of "\$500." Certainly it is requisite to prove the value of the property of the prosecutor in the thing stolen. If, therefore, by his purchase, the prosecutor acquired a qualified and special, not absolute, property, the value of that property must be proved.

Goods pawned or gauged for a debt, or leased for years, cannot be taken in execution against a pawnor or lessor.—*Dalt.* 146; *Walson on Sheriffs*, 182. Subject to the right of the pawnee or lessee, the sheriff may sell the goods so pawned or leased. Such goods cannot, however, be seized, for the pawnee or lessee has no present right of possession.—*Walson on Sheriffs*, 182; 8 *East R.* 476; 5 *John. R.* 336. Both of which cases recognize the doctrine that an equitable interest is not a subject of seizure and sale by the sheriff.

The *fi. fa.* issued on the foreclosure of the mortgage was also offered in eviden

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and rejected by the court. This document contained the entry of the sheriff that he had levied on the negro slave, the subject of the alleged larceny, as the property of the prisoner. It was material to prove a default in the payment of the money secured by the mortgage; because, on such default, the title of the mortgagee became absolute, and the property of the mortgagor in the slave, which was purchased by the prosecutor at the sale, was absolutely determined. The entries on the *fi. fa.* established two other facts material to the defence: First, That the slave was in the legal possession of the sheriff, and upon a claim having been interposed, might have been left lawfully with the prosecutor as claimant. Second, That the claim had been withdrawn, and of course the possession of the slave reverted to the sheriff.

When a sheriff has duly seized goods under a writ of *fieri facias*, he has such a *special property* in them as to enable him to maintain trespass or trover against any person who may take them out of his possession.—2 *Saunders R.* 47; 1 *Vent. R.* 52; *Watson on Sheriffs*, 191. It is not perceived how a conviction on this indictment would bar an indictment against the same party, alleging the property to be in the sheriff.

The fourth ground assigned for error is, that the court erred in rejecting the mortgage *fi. fa.* because the entries thereon proved that the prosecutor was not entitled even to the legal possession of the slave.

It seems, that an action of trover, or even of trespass, brought by the prosecutor against any person who should take the slave out of his possession, could not be maintained. A person cannot sue in trespass, if he be a *mere servant*. *Owen*, 52; 3 *Inst.* 103; 2 *Saund.* 47, *b, c, d*, cited 2 *Saund. on Plead. and Ev.* 861. The conclusion is therefore warranted, that the evidence which was rejected by the court was material to disprove the allegation in the indictment that the slave, the subject of the alleged larceny, "was the property" of the prosecutor, and of the value of \$500.

The examination, therefore, of the matters in fact in issue, was not conducted according to the rules of law.

1st. Because the jury were not empaneled according to law.

2d. Because evidence material to the issue, and conclusive to the defence of the prisoner, was rejected by the court,

The verdict of the jury is therefore erroneous.

JOHN M. ASHURST, Sol. Genl., for the State.

1st. The laws of Georgia declare the competency of jurors. See the oath testing their competency.—*Hotchkiss*, 797, 798.

2d. Challenge at common law, "*propter affectum*," was predicated on proof. A prisoner is not entitled to examine a juror on his *voire dire*, as to his having formed and expressed an opinion as to his guilt.—1 *Treadaway*, 389; 2 *Bailey*, 29.

It is not competent for a prisoner to ask a juror whether he has not, previously to the trial, expressed opinions hostile to the prisoner, in order to found a challenge thereon; but such expressions must be proven by extrinsic evidence.—*Stephens' Crim. Law*, 300; 4 *Barn. and Ald.* 491, 502.

3d. The indictment was properly laid, when it charged the property of the negro in Buffington, because an equity of redemption is an *estate*, and not a *right*.—*Coote on Mortgages*, side p. 42; 8 *Law Library*.

All the property of a defendant is bound from the signing of judgment.—*Prin. Dig.* 456.

What is property?—See *Bouvier's Dic.* 381. An estate is property, and therefore subject of sale.

Claimant giving bond is entitled to possession of property.—*Prince*, 438.

4th. A juror is competent, at common law, who has formed and expressed an opinion in regard to the guilt or innocence of the prisoner, unless done with a malicious intent.—*Stephen's Crim. Law*, 300; *Joy on Con. &c.* 189, *et seq.*; 4 *Barn.* 491, 502.

By the Court—WARNER, Judge.

The first ground of error assigned in the case is, that "the court erred in refusing to permit the juror, when sworn on his *voire dire*, to be asked if he had formed any opinion as to the guilt or innocence of the prisoner at the bar: because the Constitution of the State of Georgia provides, that 'trial by jury, as heretofore used in this State shall remain inviolate;' and the court by its decision, excluded the prisoner from the benefit of the challenge '*propter affectum*,' which was an existing ground of challenge at the time of the adoption of the Constitution."

That the right to challenge a juror "*propter affectum*," existed in this State at the time of the adoption of the Constitution in 1798, is readily admitted, (3 Bl. Com. 362;) but how the prisoner was deprived of that right, by the refusal of the court to permit him to show such cause of challenge by the juror himself, under the provisions of our penal code, as now amended by the act of 1843, is not so clearly apparent.

The act of 1843 repealed that portion of the act of 1833, which permitted the question to be asked the juror on his *voire dire*, if he had formed and expressed any opinion in regard to the guilt or innocence of the prisoner at the bar; so that the prisoner had no right to show such cause of challenge by the juror himself, as the court below, in our judgment very properly ruled.

It is true, the act of 1843 prescribes certain questions to be propounded to the juror, but it also provides, if he shall answer them in the negative, "the State, or the prisoner, may have the right to put such juror on his trial, in the manner pointed out by law, and prove such juror incompetent."

The record in this case shows, the juror answered the questions, required by the act of 1843, in the negative; then it was the privilege of the prisoner to have asked the court for the appointment of triers, for the purpose of showing the juror was incompetent, which does not appear to have been done. The act of 1843 does not take away the right to challenge a juror "*propter affectum*," but only prescribes the manner in which that right shall be exercised.

The counsel proposed to show cause of challenge, "*propter affectum*," by the juror himself, but the court very properly decided he could not do so, as the act of 1843 requires triers to be appointed, and the cause of challenge to be shown before them; either principal cause of challenge, or challenge to the favor.

It does not follow because the court refused the prisoner the right to show cause of challenge, "*propter affectum*," by the juror himself, the right of such challenge was denied him altogether, for it does not appear he applied to the court for the appointment of triers.

By the common law, the principal cause of challenge was tried by the court, and challenges to the favor only, were tried by triers, appointed by the court.—5 Bacon's Ab. 366.

The act of 1843, however, seemed to contemplate when the juror shall answer the questions required to be propounded by it, so as to make him *prima facie* competent, all further investigation, as to causes

challenge, either principal or to the favor, shall be submitted to triers, and be determined by them.

The second ground of error assigned is, that the court "repelled evidence, that at the time of the purchase of the negro slave, (the subject of the alleged larceny,) at sheriff's sale, by Samuel Buffington, sen., (the prosecutor,) the same was sold under the encumbrance of a mortgage, because such testimony ascertained the fact that the property acquired in and to said negro, by the prosecutor, under said purchase, was not absolute, but limited and *special*, and the prisoner would be at liberty to show in his defence, not only the value of such special property, but that the same was determined to disprove the allegations in the indictment, *that said slave was the property of Samuel Buffington, Sr., and of the value of five hundred dollars.*"

The third ground of error assigned by the plaintiff is, that "the court erred, in not admitting the mortgage *fi. fa.*, bill, and accompanying papers—among them the original mortgage, with the decree of foreclosure—when tendered in evidence on the part of the prisoner; because they went to prove that the equity of redemption in and to said slave was barred and foreclosed; and the entry by the sheriff thereon proved, that at the time of the alleged larceny, the said prosecutor had no property whatever in said negro, and that he was not entitled even to the legal possession of said negro."

The fourth ground of error assigned upon the record is, that "the court erred in refusing to admit the mortgage *fi. fa.* in evidence, when offered on the part of the prisoner, because the entries thereon established the fact, that the negro slave, the subject of the alleged larceny, had been levied on as the property of the prisoner, and a claim had been interposed by the prosecutor, which said claim being withdrawn, and the levy yet undisposed of, negatived the allegation in the instrument, that said slave was the property of the prosecutor."

It appears the slave George was mortgaged by the 'prisoner to Tucker. Afterwards, the slave was levied upon by virtue of an execution, issued upon a judgment obtained against the prisoner, which was of later date than the mortgage, and sold at sheriff's sale as the property of prisoner, and purchased by the prosecutor, subject to the encumbrance of said mortgage, who acquired by such purchase, all the title which remained in the prisoner to said negro; and when he paid the debt to Tucker, which the mortgage was given to secure, there is nothing which appears on the record, going to show that his title to the slave would not have been good against everybody.

The counsel for the plaintiff in error *assumes* the ground, and makes it the basis of his argument, that the legal title to the slave was in Tucker, the mortgagee, after condition broken. This court has already decided that by our law of mortgage, the title to the mortgaged property remains in the mortgagor until foreclosure and sale thereof, in the manner pointed out by statute; that a mortgage is a security for the debt. The legal title to the slave enjoyed by the prisoner was divested by the sheriff's sale, and passed to the prosecutor, who was the purchaser, and who thus acquired the possession of him.

It is true, before the title of the prosecutor to the negro was perfect, at Tucker's mortgage, he would be bound to discharge the debt,

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which the mortgage was given to secure; to raise the encumbrance created by the mortgage; but with that the prisoner had nothing to do; *his title* to the negro was sold by the sheriff, and purchased by the prosecutor, who had something more than a mere *special property* in the negro as against the prisoner. But if the prosecutor had only a *special property* in the negro, coupled with the *lawful* possession, it would be sufficient to maintain the allegation in the indictment.—*Packard's case*, 2d *East Pleas Crown*, 653; 1 *Leach*, 357; *Roscoe's Crim. Ev.* 515.

It was urged that the value of the slave was material, that it might appear whether the offence was grand or petit larceny. The 20th section of the 6th division of our penal code declares, "The stealing of a slave is *simple larceny*."—*Prin. Dig.* 630.

We do not think, therefore, that the mortgage *fi. fa.* and the accompanying papers offered in evidence by the prisoner, would have proved, as is assumed by his counsel in the third assignment of error, "that at the time of the alleged larceny, the prosecutor had *no property whatever* in the negro, and that he was not entitled even to the *legal possession* of said negro;" but on the contrary, are of the opinion the court below decided correctly in rejecting the testimony, for the reason, the prosecutor had such a legal possession of the property under his purchase at sheriff's sale of the defendant's title thereto, as in judgment of law was sufficient to maintain the allegation in the indictment; and the proffered evidence would not negative the same.

We are also of the opinion, the fact that the negro had been levied on by the mortgage *fi. fa.* in satisfaction of the mortgage debt, and claimed by the prosecutor, which claim had been dismissed, did not, in a legal point of view, negative the allegation in the indictment, that the slave was the property of the prosecutor. The prosecutor was the purchaser at sheriff's sale, as we have already seen, and obtained the *lawful* possession of the negro under such purchase, from the sheriff; and when levied on to satisfy the mortgage debt, he claimed him as his property, giving bond and security for the forthcoming of the negro at the day of sale, or when called for by the sheriff. Although the levy was dismissed, yet the prosecutor, as the claimant, was entitled to the possession of the negro for the purpose of surrendering him to the sheriff, in discharge of his bond; and depriving him of that possession, thus lawfully acquired, by the defendant, was wrongful and fraudulent, in the eye of the law.

From the best consideration we have been enabled to give to this case, we are of the opinion that there is no error in the record, and that the judgment of the court below must be affirmed.

No. 83.—JOHN S. STEPHENS *et al.*, plaintiffs in error, *vs.* GEORGE W. CRAWFORD, Governor of the State of Georgia, use of THOMAS B. WARD, defendant in error.

In an action upon a sheriff's bond, to charge his sureties, the admissions of the sheriff are *prima facie* evidence against them, unless fraudulently made, or made by mistake, or having relation to money, the paying over of which is not guarantied by the bond.

A certified copy of the record of the action of the Inferior Court in taking a sheriff's bond, made in vacation, is not evidence in a suit against the sureties; because, as to that, the action is ministerial and not judicial.

A bond voluntarily tendered by a sheriff, in office, and accepted, more than thirty days after his election, is bad as a statutory bond, but good at common law.

An official bond, required by statute, but which is not in conformity with its provisions, is good, so far as it does conform, unless the statute expressly provides that bonds not made in conformity with it shall be void.

A bond made to the governor, for the time being, and his successors in office, is considered as made to the office, and passes to each incumbent, without assignment, by succession.

This court will not send a cause back for a re-hearing because of the admission of illegal testimony, if, wholly irrespective of that testimony, there was, plainly and obviously, testimony sufficient to justify the finding.

This was an action of debt upon a sheriff's bond, tried before Judge Merriwether, in the Superior Court of the county of Baldwin, at August Term, 1846.

Upon the trial, a copy of a bond, duly certified by the proper officer, purporting to be a sheriff's bond, executed by John S. Stephens, John M. Maclin, Benjamin L. Lester, and Michael J. Kenan, the plaintiffs in error, was offered in evidence, in behalf of the defendant in error, who was plaintiff below. The bond bore date the 3d day of March, 1840, and recited, that the said Stephens was elected sheriff of the said county of Baldwin on the sixth day of January, in the year aforesaid. It was made payable to the then Governor of Georgia, and his successors in office, and for the amount required by law, and in the usual form. The introduction of the copy-bond, aforesaid, in evidence was objected to on the part of the plaintiffs in error, on the ground that it appeared that the original was not executed within the time required by law for the execution of sheriffs' bonds after their election, and that the office of sheriff of Baldwin was vacant at the time of the execution of said bond, and therefore the same was not legal evidence to charge the securities of said Stephens for any act purporting to have been done by him as sheriff. The court below overruled the objection, and permitted said copy-bond to be read in evidence to the jury. To which decision of the court below the plaintiffs in error excepted. An execution for \$320 00, principal, besides interest and costs, in favor of said Thomas Ward, (for whose use this suit was brought,) against one Henry F. Young, with the entry endorsed, "satisfied by John S. Stephens, sheriff," in the handwriting of said Stephens, was admitted in evidence, in behalf of the defendant in error, without objection. It was then proposed to prove the

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admission of said Stephens, in the fall of 1841, and during the time for which he was elected sheriff, that he had collected the money on said execution. This testimony was objected to on the part of the plaintiffs in error, on the ground that the admissions of said Stephens, the principal, could not be received in evidence to charge his securities. The court below overruled the objection, and admitted the testimony. To which the plaintiffs in error excepted.

On the part of the plaintiffs in error, it was then proven, by an exemplification of the records of the Inferior Court of said county, that said Stephens was duly qualified as sheriff elect of said county on the 11th day of January, 1840; and they offered in evidence a copy of a sheriff's bond, duly certified, purporting to have been executed by said Stephens, as principal, and Michael J. Kenan, Samuel T. Beecher, and John M. Maclin, as his securities, on the said 11th day of January, 1840; which was admitted. It was then further proved, in behalf of the plaintiffs in error, by a witness who was, at the time of the qualification of said Stephens as such sheriff, one of the justices of the Inferior Court, that the original of said last-mentioned copy-bond was executed at the time of its date, the 11th of January, 1840, three of the justices of said Inferior Court being present, in obedience to a *dedimus potestatem* issued by the then Governor; and that said bond was taken, and the oath of office was then administered to said Stephens, in obedience to, and by virtue of, the authority vested in them by said *dedimus potestatem*.

The counsel for the defendant in error, by way of rebuttal, then offered in evidence a paper purporting to be an exemplification of the records of said Inferior Court, reciting that the court, being under the impression that the bond given by said Stephens as sheriff might be somewhat informal, and as he had tendered an additional bond, (the bond sued on,) for the sum of twenty thousand dollars, with John M. Maclin, Benjamin L. Lester, and M. J. Kenan as securities, which was accepted; it was ordered, therefore, that the clerk should transmit it to the clerk of the Superior Court for record and file, together with the bond taken previously, to wit, the bond of 11th January, 1840; which acceptance of said bond, and the passing of said order, took place on the 3d day of March, 1840;—which was objected to on the part of the plaintiffs in error, on the ground that the said justices of the Inferior Court were not authorized to meet at that time for the purpose of taking said bond, and which was the bond sued on, and that said justices were not authorized to take the same, or make any record of their meeting or proceedings; that said paper, or exemplification, was mere hearsay evidence, and not competent for any purposes as against the plaintiffs in error. The court overruled the objection, and permitted said paper to go to the jury in evidence. To which decision the plaintiffs in error excepted.

The counsel for the defendant in error, by way of rebuttal, further proved, that the bond sued on was presented and tendered by the plaintiff in error, Stephens, to the Inferior Court, stating at the time that he offered it because there was some dissatisfaction with the first bond; and it was thereupon accepted by the justices. Upon cross-examination of the witness, it was proved, that the meeting of the justices, when the bond sued on was taken, was not by virtue of any *dedimus potestate*.

directed to them from the then Governor, or by any authority from any of the departments of government, and that the said bond was not taken or received by virtue of any such authority.

The parties having closed their testimony, the plaintiffs in error moved the court that, upon the whole evidence in the case, as submitted to the jury, the bond sued on was invalid, and not sufficient in law to authorize a recovery against the plaintiffs in error; but the court decided that the said bond was valid, legal, and binding upon the plaintiffs in error, and so instructed the jury, and they found accordingly. To which decision, and instruction to the jury, the plaintiffs in error excepted.

FRANCIS H. CONE, for the plaintiff in error, insisted that the bond set forth in the declaration of plaintiff below, is not good as a statutory bond.—*Prin.* 177-8, 183, 430; *Hotchkiss*, 507, 514.

It is not good as a bond, at common law.—5 *Com. Dig.* 219; 3 *Dev. Rep.* 86, 286.

1st. Because there was no delivery.—7 *Pick. Rep.* 91; 3 *Dev. Rep.* 86, 286; 2 *Harris and Johns.* 108; 2 *Porter's Rep.* 443; 1 *Tucker's Com.* 236-7; 4 *Kent.* 454; 6 *Peters' Rep.* 124.

2d. Because a voluntary bond cannot be sued in the name of a successor.—1 *Dev.* 153; 1 *Leigh's Rep.* 485.

A copy of a voluntary bond is not evidence, unless the original is accounted for.

IVERSON L. HARRIS, for defendant in error.

Two questions collateral to the chief question involved under the transcript, have been made by the learned counsel for plaintiff in error, to which I will first address myself.

1st. That there was no *dedimus potestatem* from the executive, authorizing the taking of the bond sued on, it being the second taken by the justices of the Inferior Court.

The authority to take sheriff's bonds is, by the act of 1803, (*Prin. Dig.* p. 176, and *Cobb*, p. 480,) vested in a majority of the justices of the Inferior Court.

The act of 1799 (*Prin. Dig.* p. 430) confers no authority upon the executive to do anything but commission that officer; and notwithstanding the bond is made payable to the Governor and his successors, it is never taken by the Governor, or delivered to him, or deposited of file in his office; but it is appointed to remain of file in clerk's office of the Superior Court, and is sueable not at his will, but only by the order of the judge of the Superior Court for the county; and this for the satisfaction of the public, or any person aggrieved by sheriff's or deputy-sheriff's misconduct.

The bond is emphatically payable to the office, for the security of the whole people.

A bond taken of a sheriff, who is an officer belonging to the judicial department, and over whom he has no control, would probably be void, for he has no authority by law to take such a bond, nor would the exercise of such authority fall within any of the principles so luminously stated by Justice Story, in *Tingey's case* in 5 *Peters*.

A fortiori, if the Governor has no authority in such matters, how can his *dedimus potestatem* confer a power which not only does not belong to his department, but which has been denied to it. It is mere waste paper. The law has conferred the right on others. It can be no objection, then, that the bond sued on was taken without executive authority.

The second question presented is, that forasmuch as the statutes (*Prin. Dig.* pp. 177, 178, and 183), require that a sheriff shall give bond, &c., within ten days after being commissioned by the Governor, and failing to do so, directing the Inferior Court to declare the office vacant, &c., the bond sued on is void, because

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Stephens was commissioned on 8th January, 1840, and this bond not executed until the 3d of March, 1840. Three answers, and each deemed to be conclusive, may be given, viz :

1st. There can be no vacancy in the office until it *shall have been so declared* by those to whom the power of vacating it is intrusted.

2d. The securities are estopped, by the recitals in the bond, from denying that Stephens was sheriff *de facto et de jure*, at the time of its execution.

3d. The statute referred to, forms no portion of the contract of the securities; the condition of the bond has no reference to it whatever. Besides, all such statutes are merely directory to the agents of the government, and the omission of those agents to perform the duties required of them can form no defence for the securities.—*U. S. vs. Van Zandt*, 11 *Wheaton*, 184; *Dox, et al. vs. Postmaster Genl. 1 Peters*, 318; 3 *Mason*, 446.

The transcript exhibits the fact that the certified copy of the bond was objected to, on the ground that the *delivery* of the original had not been proved.

At common law, the possession of a bond by an obligee is *prima facie* evidence of it.—*Clark vs. Ray*, 1 *Harris and John*. 323; 1 *Harris and Gill*, 324.

Coming, however, as this duly certified copy does, from the legal depository of the original, after its acceptance, the law will presume the antecedent requisite. Our statute precludes any such objection, as there is no plea of *non est factum*. The failure to plead it is an admission of the entire execution of the bond.

The important question to be decided on this transcript is—Is the bond sued on good, either as an official or as a voluntary bond?

That it is good as an official bond, is supported by the case of the *Treasurer vs. Bates*, 2 *Bailey S. C. Repts.* 366; *Steven's case*, 2 *Nott and McCord*, 108.

In *Bates' case*, the bond was beyond the sum, by several thousand dollars, of the amount of penalty prescribed by statute.

Here, two bonds were taken, making an aggregate penalty of \$40,000, or twenty thousand dollars more than prescribed by statute. The principle is unchanged by the number of bonds. The question is, Can a bond be sustained as an official bond, where a greater penalty is imposed than the statute prescribes?

Judge O'Neal, pronouncing the opinion of the whole Court of Appeals, says: "It is supposed that the bond, if not taken in exact conformity to the act, is void. But the act itself makes no such provision; and unless it does, the objection is unavailing. For, to render a bond taken under a statute void, it must be so according to express enactment, or must be intended to operate as a fraud on the obligors by color of the law, or as an evasion of the statute.

At common law, a consideration is not necessary to the validity of a bond.—7 *Term*, 447; *Page vs. Freeman*, 2 *Mass. R.* 159, 162; 2 *Johnson*, 177; 13 *Johns.* 430; *Plowden*, 308.

As a *voluntary bond*, it would be good at common law, unless for an immoral or an illegal consideration, or unless contrary to public policy.—*Sheppard Touchstone*, 2 vol. 207; 2 *Peere Wms.* 181; 4 *Petersdorf Abr.* 402.

In the U. S., the following cases recognize the validity of such a bond as this as a voluntary bond.—5 *Greenleaf*, 240; 2 *J. J. Marshal*, 473; *Hoy et al. vs. Rogers et al.* 4 *Monroe*, 225; *Cross vs. Gabeau and Hunt*, 1 *Bailey*, 211; *Governor vs. Mallock*, 2 *Hawks*, 366; *Morse vs. Hodson*, 5 *Mass.* 314; *Commonwealth vs. Wolbert*, 6 *Binney*, 298; *Tingey's case*, 5 *Peters*.

The case of the U. S. vs. *Brown*, in *Gilpin*, p. 155, is an elaborate review, by Judge Hopkinson, of the cases arising upon bonds. The examination of the U. S. vs. *Morgan et al.* in 3 *Wash. C. C.*, there made, places that case upon its true basis. It should no longer be cited as an authority against official bonds, not conforming to the statute, being absolutely void and incapable of being enforced as voluntary bonds.

The cases relied on by my learned adversary, (*U. S. vs. Gordon*, 7 *Cranch*, 287; *Governor vs. Twitty*, 1 *Devereux*, 153; *Branch vs. Elliott*, 3 *Dev.* 86; *Justices vs. Armstrong*, 3 *Dev.* 286,) recognize the broad principle I am now maintaining, that official bonds, when not conformable to statute requiring them, a

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good at common law. The case of the *Commonwealth vs. Jackson*, 1 Leigh, 485, is not in conflict with any of the foregoing authorities. The bond was declared void in that case, because it was against public policy to allow an unauthorized person to require one.

As to the admission of Stephens to bind his securities—they being privies in law, his admissions are *prima facie* evidence to bind them.—*Treasurer vs. Bates*, 2 Bailey, 362; 4 Randolph, 317; *Preston's securities*, Gilmer Rpts., 235; *Pendleton vs. Bank Kentucky*, 1 Monroe Rep. 177; *Judge Cone in case vs. Securities of Haynes*.

The verdict below should remain undisturbed. Lester, the plaintiff in error bringing up this case, can complain of no oppression on him; the bond imposes on him no increased penalty; he is a volunteer, a substitute for Beecher, a security on first bond. He signs and seals this obligation of his own free will; it was not exacted or required; it was not taken *colore officii*. The justices had nothing to do in its preparation; it is all the act of the defendants, their paper, and ink, and form—no clerk of the court assisting or directing. He comes for relief in a most questionable shape.

The verdict below should be confirmed, because it is according to the justice of the case. This writ of error is virtually an application for a new trial. The principles regulating the granting such application, are well stated by Buller, Justice, in *Estwick vs. Cailland*, 5 Term Rpts. 420.

"The only question," says he, "is, whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case; for though the judge may have made some little slip in his directions to the jury, yet, if justice be done by the verdict, the court ought not to interfere to set it aside. If, indeed, the facts be doubtful, and the attention of the jury has been drawn from the consideration of them, that is a good ground for a new trial. But if the facts be clear, and those facts have been laid before the jury, we ought not to grant a new trial in order to give the unsuccessful party the chance of obtaining another verdict, if the former verdict be agreeable to the equity and conscience of the case."

By the Court—NISBET, Judge.

This is an action on a sheriff's bond, to charge the sureties for a default of their principal, and the first question made is, whether the admissions of the principal can be given in evidence to charge them?

We think they are *prima facie* evidence of their liability, and cast the onus upon them.

This court has determined that a decree against a guardian upon a bill suggesting a *devastavit* to which they were not parties, is no more than *prima facie* evidence against the sureties—they can inquire into the grounds of the decree *ab origine*. With stronger reason the admission of a principal is only *prima facie* evidence. The sureties may show in rebuttal, that the admission was made by the sheriff by mistake—or collusion with third persons for the purpose of charging them—or any other fact which demonstrates that the money received by him was not guaranteed to be paid over by them. Any other rule would be unjust to them.

It is, however, both reasonable and according to the settled practice of the courts, that his admission should go against them as *prima facie* proof of liability. They would be conclusive upon himself, if *bona fide* made, and will bind the sureties, because they are his privies in law. It is not to be presumed that one will charge himself falsely—the legal presumption is that they are true until the contrary appears. With these qualifi-

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cations, we think, the testimony was properly admitted.—2 *Bailey*, 380, 381; 5 *Binney*, 184; 1 *Starkie*, 189, 223, 243; 3 *McCord*, 412.

The next exception which we notice is to the decision of the court below, admitting in evidence what purported to be a certified copy of the record of the action of the Inferior Court of Baldwin county, at the time they took the sheriff's bond sued upon tendered in evidence by the plaintiff in rebuttal. And here it becomes necessary to advert to the facts.

Stephens, the sheriff, was elected on January 6th, 1840—was commissioned on the 8th, and gave bond on the 11th, of the same month. Afterwards, to wit on the 3d of March, and after the expiration of 30 days from his election, he voluntarily appeared before three of the justices of the Inferior Court, and suggesting that the bond already given was supposed by some to be invalid, offered for their acceptance a second bond—the bond sued upon—which they accepted and delivered over to the clerk of the Superior Court. This was not done at either a regular or an adjourned term of that court. The record offered recites the action of the court, at that time, in taking this second bond.

The reasons urged against the admission of it are, that the time, to wit, 30 days, within which the law directs the sheriff to qualify having transpired, the justices had no right to take the bond; their action was a nullity, and therefore the paper tendered is no record, and not competent evidence to charge the defendants. We express now no opinion, as to the power of the court to take the bond, reserving that question for the present. We think upon other grounds the testimony was improperly admitted.

We doubt the power of the Inferior Court, in vacation, to make a record unless it is of a judicial act, which the law directs to be done in vacation, or which the court itself at a regular or adjourned term, by order appearing upon its minutes, may direct to be done in vacation.

Upon this subject the opinion of this court has been fully expressed elsewhere. The act of the Inferior Court now being considered, was not a judicial act.

By the judiciary act of 1799, the sheriff is required to give bond before any one of the judges of the Superior Court, to be approved by the justices of the Inferior Court, or any three of them.—*Prince*, 430.

By the act of 1803, every judge of the Superior Court, or a majority of the justices of the Inferior Court, are declared competent to take the bonds of sheriffs and to qualify them.—*Prince*, 176, 177. By this act they are appointed the agents of the State for this purpose. The duty devolved upon them is ministerial—it is required of them not as a court, but as individuals, designated by their official name, and presumed, because of the office they hold, to be discreet men. We refer now to the taking of the bond, and not to the administering of the official oath.

We do not perceive, therefore, that the act appertains to the business of the court, or belongs to its records. As ministerial agents, we are satisfied they have not the power in vacation to make a record; and if they had, it will not be a record of the Inferior Court. Besides this testimony was supererogatory. The record was not necessary to show the execution of the bond, or before whom it was executed. At the time this reco-

was tendered, a certified copy of it was, in evidence, attested officially by three of the justices of the Inferior Court—bearing date on 3d March, and coming out from the Clerk's office of the Superior Court, its legal depository. And for this reason, although we think, that in the admission of this evidence the court erred, we will not on that account send the cause back for a re-hearing.

It is well settled that a new trial will not be awarded because illegal testimony was admitted, if, wholly irrespective of that testimony, there was plainly and obviously evidence sufficient to justify the finding.

A court for the correction of errors, we hold, has, in relation to this matter, as ample, if not greater, discretion than the Circuit Court has upon an application for a new trial.

It will, to use the language of the Supreme Court of New York, look beyond the letter of the error assigned, and inquire how far that error affected the judgment of the court, or the finding of the jury.—9 *Cowen*, 680. We have no doubt but that the discretion now claimed belongs to all corrective tribunals: It is expedient, as preventing delay and cost in the administration of justice, that this court should be clothed with such power. It has exercised that discretion already.—See *M'Cluskey Adm'rs vs. Washington Leadbetter*, tried at Gainesville, in September. We are not left to rest the power upon the practice of other courts; for our own organic law confers it. It is therein enacted that, "upon the decision of the said Supreme Court, on matters of law, or principles of equity, which may arise in the bill of exceptions, the court shall cause to be certified to the court below such decision, and award such order and direction in the premises, as may be consistent with the law and justice of the case, which decision so rendered and ordered, and direction so awarded, shall be respected and carried into full effect by the court below."—See *Act to organize the Supreme Court*, sec. 5. By this clause the power is conferred to award such order and direction in the premises, as may be consistent with the law and justice of the case.

We have now arrived at the point where, as we suppose, all the other assignments of error may be summarily comprehended in two positions, taken in the argument by the counsel for the plaintiff in error. These positions are:

1st. That the bond upon which the plaintiff's action is founded, to wit, the second bond given by Stephens, the sheriff, and dated on the 3d of March, is not valid as a statutory bond; and therefore the plaintiff is not entitled to recover.

2d. It is not valid as a voluntary or common-law bond, and therefore the plaintiff cannot recover.

We hold that the remaining points, no matter how originating or how stated, must necessarily be considered and adjudicated, in our discussion of, and opinion upon, these propositions.

Both of these positions were determined against the plaintiff in error in the court below.

1st. Is this a valid bond, under the statutes of Georgia?

By the act of 1809, (*Prince*, 177,) it is made the duty of the sheriff elect to apply for his commission within twenty days from his election; and to take the oath of office and give bond within ten days after being

1 of the arrival of his commission, by the act of 1811, *Prince*,

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178. By the act of 1823, (*Prince*, 183,) if he does not qualify and give bond within the time prescribed by the two before-recited acts, that is, within thirty days, his office is declared vacant and he ineligible.

In view of these statutes it is argued, that this is not a valid bond, because *first*, not being given within thirty days, the office was vacant, and the sheriff could not therefore have given it under the statute.

Now, it is true that the Legislature has declared that unless bond is given within thirty days, the office shall be considered as vacant.

The object of this requirement is to secure the early services of an officer under bond, and the execution of the bond is a condition precedent to the enjoyment of the office; it perfects, so to speak, the sheriff's title to it. A default here works a forfeiture, against which the Inferior Court cannot afterwards relieve.

If there was no bond executed in this case, then was the office forfeited, and once a forfeiture always a forfeiture. The Inferior Court, in that event, could not have regarded him as sheriff; he could not have tendered, and they could not have received a bond, *colore officii*! But was there no bond given within time?

The record discloses that there was a bond executed by the sheriff Stephens, to the governor of the State, on the 11th January, 1840; and therefore within time. Whether that bond be valid or not, does not devolve upon us to determine. It has not, so far as appears to us judicially, been declared invalid by any court having jurisdiction over it. The Inferior Court has not declared it void by declaring the office vacant, and ordering a new election. We only know the fact that a bond was executed within time, and from aught that appears, that it is a good bond, and that the sheriff is properly in office. We cannot therefore say that the bond sued on is not a valid statutory bond, for the reason that the office was vacated.

2d. It is argued, that it is not a good statutory bond, because not having been taken within time, it is not taken according to the requirements of the statute.

It is insisted that, after the expiration of the time, it is not competent for the Inferior Court to demand a bond of the sheriff; that their power to take it is limited, as to time, by the statute; and that this bond, bearing date after the expiration of the prescribed time, cannot, in any sense, be considered as taken in conformity with the law. We consider this position impregnable. It is true, as claimed by learned counsel for the defendant in error, that if a bond, required by statute, departs from its strict provisions, as where the penalty is larger than that named in the act, it is notwithstanding good, so far as it is in conformity with it; unless the statute expressly declares that all bonds, not taken in conformity with its provisions, shall be void.

This proposition, as a rule of law, has an exception in the case of a bond intended to operate as a fraud upon the obligors, by color of the law, or as an evasion of the statute.—2 *Bailey*, 376; 2 *N. & McCord*, 425; 2 *McCord*, 107; 6 *Binney*, 298. But this case does not fall within the doctrine last stated. This is not the case of a bond in part conformed to a statute, and valid, as to that part, and void as to the remainder of its obligations. It is a bond required by the Legislature to be taken within a time limited, and taken beyond that time.

The act requiring it to be taken within thirty days, restricts the agent, viz., the Inferior Court, to that time; they cannot enlarge their powers. If they can defer a demand for the bond until one day after the time, they may a hundred, and thus defeat the intent of the Legislature altogether.

If the court has the power to demand a bond in this case, I see no reason why the right would not equally exist, in a case where there was confessedly a forfeiture of the office. But could they by asking, and the sheriff by giving, a bond, where none had been given in time, revoke the forfeiture of his office? Clearly not. Besides, if they in such a case may be considered as, under the law, entitled to call upon him for a bond, he must have the reciprocal right to give one, and thereby retain an office which his previous default had vacated. Besides, having given one bond, the sheriff has complied with the condition upon which he is to hold office, and the court has no right to cast burdens upon him which the law does not impose.

These views are intended to illustrate the position that this cannot be regarded as a statutory bond. We do not find that this conclusion is much strengthened by the fact which counsel for the plaintiff in error seemed to regard as of some importance, that there was no *dedimus postestatem*, to the Inferior Court to take this bond.

If the law does not confer the power, the executive *dedimus* cannot give it, and if it does, then the *dedimus* is but a wasteful surplusage. We have seen that the Legislature has conferred it, but, as we have attempted to show, to be exercised within a limited time.

What further remains is to inquire whether this be a valid bond at common law? We think it is. We recognize the position occupied by the counsel, that to be good as a voluntary bond, it must have all the incidents of a deed; it must be signed sealed, attested and *delivered*. One of these incidents, to wit, delivery, it is said, is wanting. The bond is made payable to Charles J. McDonald, Governor of the State of Georgia, and his successors in office, and the argument is, that it was not delivered to Charles J. McDonald. We cannot see that it was necessary.

In considering the question, whether it be, or not, a good voluntary bond, we must look to the circumstances under which, and the character in which, it was given. A bond made to A and delivered to B is void for want of delivery. That is, however, not this case. The obligor, Stephens, is the sheriff of Baldwin county; as sheriff he goes to the Inferior Court, and suggesting that his previously executed bond was considered void by some, of his own mere motion tenders to them an additional bond, which they accept. The act was voluntary. It does not appear that the court, *virtute officii*, as agents of the State, considered the previous bond void, and asked a new one, or used any means, by suggestion, threats, or otherwise, to get it. The evidence is that he of his own accord tendered it.

Now it does seem to me that it does not lie in the mouth of this obligor to object to the validity of this bond. He is estopped, and so are his securities; for their assumption of the obligations of the bond was also voluntary, and they are his privies in law. What can they say against the breach of a contract thus intelligently, willingly and honestly made? Nothing. They must lie down under the burdens they assumed.

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We have said that it was not necessary that this bond should be delivered to Charles J. McDonald. We have already seen that the Inferior Court are by law authorized to take the sheriff's bonds; and to them, or one of the Judges of the Superior Court, as the appointee of the law, it could alone be legally delivered, *and to them it was delivered*. Charles J. McDonald has no more interest in it than any other citizen. His name is but the representative of the sovereignty of the State. It is the people's bond, made payable to him, as a nominal custodian of its obligations.

The true position upon this point is this: a bond required by statute and made payable to the Governor, is payable to the office. In this particular the Governor represents the people, and may be regarded as a sole corporator, and each chief executive takes everything that belongs to the office by succession.—2 *Bailey*, 378; 1 *McCord*, 568; 2 *Bailey*, 13.

And here it may be well to dispose of the exception, that this action cannot be sustained in the name of *George W. Crawford, Governor of the State of Georgia and successor of Charles J. McDonald* without an assignment. Upon the principles above stated, there is no difficulty here. It is made, by the act of the parties to it, payable to the successors of Governor McDonald, and the pleadings show that George W. Crawford is his successor. The law which creates an official bond, and makes it payable to a public officer and his successors, makes a transfer and tradition of it to each incumbent. As before stated, they take the bond as appertaining to their office by succession. In this aspect of this cause, that is, looking at it with reference to the rights of the obligees, the bond assumes a statutory character. But more of this anon.

To return to the question of delivery. The only inquiries to test the sufficiency of the delivery are, to whom does the law direct this bond to be delivered, and was it delivered to the persons appointed by law to receive it? The answers are, that the statutes of Georgia declare the Inferior Court competent to take it, and require it to be turned over to the clerk of the Superior Court for custody, and that it was taken before them, and by them delivered to the clerk of the Superior Court. All of which not only amounts to delivery, but, in our judgment, is the only kind of delivery which would fulfill the requirements of the law.

We have said that after the expiration of thirty days, the Inferior Court has no power or right to demand an additional bond from the sheriff. Whilst this is true, we yet hold that it is competent for them, in their official character, and with a view to secure the faithful execution of the duties of the sheriff, to receive an additional bond from him, when voluntarily tendered; and, when so received, the rights under it inure to the parties interested, as in case of the first bond. The security is cumulative. Their original power to receive a bond is continued, in cases where the law being complied with and the sheriff in office he in that character tenders other securities.

In this view of it the bond would seem to be statutory. As to the obligors, it is unquestionably voluntary.

Taking into view the circumstances under which it was made; the character of the obligor, and also of those to whom it was delivered.

we can give it no other designation than this, to wit, a common-law bond. And being delivered to the Inferior Court, and attested by them, and found where the law directs it to be placed—in the custody of the clerk of the Superior Court—we are of the opinion that the presiding judge committed no error in admitting a certified copy of it to go in evidence.

Let, therefore, the judgment of the court below be affirmed.

No. 84.—In the matter of JOHN S. STEPHENS, former Sheriff of Baldwin.

A sheriff is liable to be attached for the failure of his deputy to pay over money collected on an execution by him.

KENAN and ROCKWELL, for the late sheriff.

MR. ROCKWELL'S Argument.

The liberty of the citizen cannot be abridged or taken away without authority of law; and the provisions of that law ought to be clear and unquestionable.

It is proposed, in the discussion of the question presented by this record, to inquire into the power of the superior courts of Georgia to punish sheriffs by attachment—in what cases they are so punishable—and how that punishment is to be carried into effect.

1st. There is no other statute bearing directly on this question, except the 50th and 52d sections of the Judiciary Act of 1799. From these enactments of the Legislature, the power is unquestionably derived.

The 50th section of the act provides, “that the sheriff shall be liable either to an action on the case, or to an attachment for contempt of court, at the option of the party, whenever it shall appear he hath injured such party, either by false returns, or by neglecting to arrest the defendant, or to levy on his property, or to pay over to the plaintiff or his attorney the amount of any sales which shall be made under or by virtue of any execution, or any money collected by virtue thereof.”—*Prin Dig.* 431.

The mode of proceeding by attachment, however, is not pointed out by law; and the presumption is, that the proceeding was to be such as was known to the courts of England, from whose practice this proceeding was adopted.

Previous to the enactment of the Judiciary Act, if the practice obtained at all in this State, it must have been governed by the rules of the English courts; and by those rules sheriffs were punishable by attachment for constructive contempt in two cases only; first, for not returning the writ of *capias ad respondendum*; second, for not bringing in the body of the defendant. In all other cases, parties injured by misfeasance or nonfeasance of the sheriff, were left to their actions in the proper courts for redress.

If the plaintiff be dissatisfied with the bail taken by the sheriff, he should rule him to return the writ.—1 *Tidd's Prac.* 253. It is not usual for sheriffs to return the writs, unless ruled for that purpose.—*Watson on Sheriffs*, 63. If there be no rule of any of the matters which by law the sheriff is authorized to return, after ruled for that purpose, it is a contempt, for which the court, on a proper

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affidavit will grant an attachment.—1 *Tidd's Prac.* 254. If he returns "*cepi corpus*," he is then ruled to bring in the body.

The object of this proceeding is to fix the sheriff with a liability to pay the debt and costs.—3 *Chit. Prac.* 391. This object is attained in Georgia under the provisions of the Judiciary Act, by another mode.

This method of proceeding is based upon the supposition that the sheriff, by his officers, may readily ascertain the solvency of the sureties, and he may always resort to them for indemnification; and that if he were not absolutely liable for the defendant's putting in sufficient bail, or for the defendant's rendering himself shortly after the arrest, there would be great facilities of collusion between the officers and the defendant, who, unless the sheriff were absolutely liable, would, for a trifling *douceur*, be induced to take any description of bail, though secretly known by them to be in insolvent circumstances.—3 *Chit. Prac.* 390. Under this proceeding the sheriff is made liable for the debt really due.—7 *Term R.* 370; 8 *ib.* 29; 1 *H. Bl. R.* 233; 9 *East R.* 316. The sheriff is not *imprisoned*, however, on failure to pay the debt forthwith. A rule *nisi* is frequently obtained to stay the proceedings or to set aside the attachment, and is granted absolutely sometimes, on payment of costs, as where bail has been put in and perfected, though not in due time; sometimes conditionally, to let in a trial on the merits, when the attachment is ordered to stand as a security.

In all these proceedings it makes no difference whether the process be in the hands of the high-sheriff, the under-sheriff, or bailiff, except in cases where the defendant resides within a liberty, when the bailiff is liable to the rule and subsequent proceedings, but is only amerced.—1 *Tidd Prac.* 257.

This mode of proceeding is altogether abolished by the provisions of the Judiciary Act of 1799, sec. 14.—*Prin. Dig.* 423.

Imprisonment, then, it seems, was not a necessary consequence of an attachment against the sheriff.

The 50th section of the Judiciary Act determines the cases in which the party injured may apply for an attachment against the sheriff; but it is silent as to the imprisonment of the sheriff. It is fair to presume that in adopting this remedy, the Legislature meant to adopt the rules which governed the courts of England in its application and enforcement.

It certainly seems reasonable, that in the Court of King's Bench, when an attachment is obtained against the sheriff for not returning the writ, or bringing in the body, that it should be set aside to *let in a trial on the merits*. The existence of the debt was a *fact* to be ascertained in the only mode known to the English courts—a *trial by jury*. The same reason applies with equal force in case of an attachment against the sheriff, under our law, for not paying over money collected by virtue of an execution. The whole sum apparently due on the execution may not be due, and the amount due becomes a *fact* to be ascertained.

Upon a failure to pay over money collected on a *fi fa.*, the English practice afforded a proceeding of another description.

It is the duty of a sheriff to pay over the amount of the levy to the plaintiff, and after a return to a writ of *fi fa.*, that the money is levied, the sheriff is liable to an action for it, without any demand of payment.—*Sewell's Law of Sheriffs*, 255; 3 *Campb.* 347. There is no instance to be found in any of the English books, of a rule and attachment against the sheriff for not paying over the money levied under a "*feri facias*."

"If the sheriff return '*feri feci*,' (says *Watson*, p. 202,) the plaintiff may proceed for the money against the sheriff by action of debt, founded on the return, (citing *Cro. Car.* 539; *Hob.* 206; 2 *Saund.* 334;) or by action for money had and received, (citing 3 *Camp.* 347; 1 *Stark.* 345;) or by the rule of 'court'—for which last he cites no authority, and indeed does not in the whole chapter allude to it again.

Previous to our judiciary acts, it seems, if the process of attachments against sheriffs was used in Georgia, it was governed by the rules of practice known to the English courts; and no such proceeding was warranted by law against

sheriff for not paying over money raised on a *fi. fa.* The 50th section of the Judiciary Act of 1799 gave this remedy to plaintiffs against sheriffs for a default in the payment of money collected by them.

This, in its terms, is confined to the default of the sheriff himself. If the attachment is a criminal proceeding, then is this a penal law, and should not be strained, in its construction, to embrace matters not within its provisions.

Another provision seems to be necessary to imprison the sheriff, although by the previous enactments he was liable to attachment for contempt. This is accordingly found in the 52d section of the same law: "Whenever the sheriff of any county within this State shall fail to make proper returns of all writs, executions and other process put into his hands, or shall fail or neglect to pay up all moneys received on such executions when he shall be required to do so, he shall be liable to an action for contempt, and may be fined, imprisoned or removed from office, in the manner prescribed by the Constitution.—*Prin. Dig.* 432.

This, though not very intelligible, may be deemed as giving authority to imprison by attachment after a failure to pay over the money due on a *fi. fa.*, according to the requirement of a rule absolute. This, however, is confined to such executions as may be put in the sheriff's hands.

The Legislature seemed to be aware of the difficulty and injustice of punishing criminally sheriffs, for defaults of their deputies, and accordingly, in 1841, rendered the deputies liable to rule and attachment.—*Cobb's Anal.* 123.

The court below decided that the sheriff was not criminally liable for the acts of his deputy, but nevertheless ordered an attachment to issue against him.

The attachment alluded to in the English practice for not returning the writ, or bringing in the body, is a criminal process.—1 *Tidd's Prac.* 261; *Watson on Sheriffs*, 121; 4 *McCord R.* 237.

The attachment is issued in the name of the State, people, or the King, as criminal processes are usually entitled.—5 *John. R.* 235; 9 *ib.* 160; 3 *Term R.* 133; 7 *Term R.* 439, 528; 2 *East*, 182; 12 *ib.* 165.

If the attachment be a criminal process, it was awarded by the court against a party not criminally liable for the act on which the proceeding was founded.

2d. The attachment against a sheriff being derived from the English practice, that practice must be looked to in order to ascertain the mode of proceeding.

When an order for attachment is obtained, it is the practice of K. B. to issue an attachment *nisi*. This is regulated by the rules of that court. There is no rule of court or statute law of Georgia, known to the counsel, on this subject. And as the courts of Georgia have adopted this process from the practice of the Court of King's Bench, it is reasonable to suppose they adopted with it the mode of issuing and carrying it into operation.

The effect of personal service of rules and copies, and the demand of the payment of the money, or performance of the thing commanded, is to perfect and complete the contempt; and by the English practice, before the attachment for contempt can issue, an affidavit of the regular service of the rules must be made. In the case of costs, as between attorney and client, the attachment is "*nisi*;" but as between plaintiff and defendant, it is absolute.—*Chit. Prac.* 606; *Dowl.* 533; 3 *ib.* 538.

By rule of K. B., *Trin. T.*, 17 *George 3*, it is ordered that attachments shall be absolute in the following cases only:

1st. For non-payment of costs on a master's *allocatur*.

2d. Against a sheriff for not obeying a peremptory rule to return the writ;

3d. For contempt of the court in the execution of the process of the court.—2 *Dow*, 747; 3 *M. and Scott*, 556. On a return of rescue, the motion for attachment is absolute in the first instance.—3 *Chit. Prac.* 606 n.

It would seem at least to be the better practice, as the contempt begins on a failure to perform the mandate of the court, that the party alleged to be in contempt should be heard before punishment, as to his defence, if he has any; and that the attachment should be, in the first instance, "*nisi*" only.

3d. In *Lacock's case*, (*Latch*, 187,) and in *Sanderson vs. Sheriff of London*,

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(3 Wils. 310,) it was said: "The sheriff shall be fined or amerced, and shall answer in damages to the party for the misdemeanor of the under-sheriff, but he shall not be imprisoned or indicted." There is no authority, it is believed, to the contrary.

The sheriff is not, then, liable to attachment and imprisonment for a default of his deputy in not paying over money collected on a *fi. fa.*:

1st. Because of the provisions of the Judiciary Act of 1799, the attachment and imprisonment is confined to his own default.

• 2d. Because, by the English practice, he was not so liable, previous to the Judiciary Act of 1799.

3d. Because the act of the Legislature of 1841. has specially rendered the deputies of sheriffs liable for their own acts.

IVERSON L. HARRIS, *contra*.

By the Court—LUMPKIN Judge.

This was a rule against the late sheriff of Baldwin county, calling on him to show cause why he should not pay over to the plaintiff, the principal and interest due on a *fi. fa.* issuing from Baldwin Superior Court, in favor of Martin E. Edwards, for the use of Smith and Este, *vs.* Thomas Haynes. Stephens returned to said rule for answer, that it appeared by the entry of satisfaction upon said execution, dated 25th Jan., 1840, that his late deputy, John A. Deane, had received the money due thereon, and that the same had never come to his hands; and that he was advised and believed that a sheriff is not criminally responsible for the act of his deputy.

At August Term, 1846, Judge Merriwether decided, that this showing was insufficient, and that the plaintiff was entitled to have the rule made absolute. And on failure to comply therewith, he further ordered, that on application to the clerk an attachment should issue against the *body of the said* Stephens. To all of which counsel for the plaintiff in error excepted and complain:

1st. That the court erred in awarding an attachment against the late sheriff, after deciding he was not criminally liable for the acts of his deputy, because, as to the sheriff an attachment is a criminal process.

2d. The court erred in granting an attachment absolute against the late sheriff, without calling on him to show cause why a peremptory attachment should not issue.

3d. The court erred in ordering an attachment to issue against the late sheriff, the whole proceeding being founded on a *feri facias*, because of a failure of his deputy to pay over money collected thereon by him: the sheriff is only liable to an action.

I do not deem it necessary to notice at all the first ground set forth in the assignment of errors, inasmuch as we are not called upon to decide whether the court was right or wrong in conceding, that the principal sheriff was not criminally responsible for the acts of his deputy; but to say whether or not the court erred in awarding an attachment against the late sheriff. And this judgment we must pronounce without regard to any other opinion expressed by the presiding judge in the premises.

Nor is it necessary to bestow more than a passing remark upon th-

second point. Ordinarily, it is the regular course to move *first* a rule *nisi*. There are cases, however, where the rule for an attachment is made absolute in the first instance.—*Andrews vs. Sharp*, 2 *Blk. Rep.* 912; the *King vs. Peekham*, *ib.* 1218; 12 *Ves. Jr.* 202, 203; 3. *Chit. Prac.* 606, *n.*

In the present case, it plainly appears that the sheriff had notice. He made what showing he could to purge himself of the contempt, and the order was that he pay the money, *or be attached*. He had his day then in court, and failing to obey the pronounced judgment of the court, it cannot be maintained that he should not be instantly attached.

The most material question yet remains to be considered—is the sheriff liable to be attached for the failure of his deputy to pay over money which he has collected on an execution? Both upon principles of law and public policy, we are clearly of the opinion that he is.

It is needless to resort to the practice of the English courts, to show that the sheriff is constantly made responsible by attachment for the misconduct of his jailors, and other under officers. The books are full of such cases.—See 1 *Bingham*, 150, 423, *et passim*.

We hold that the 50th and 52d sections of the judiciary of 1799 are conclusive upon this subject. The 50th section of the act provides, "that the sheriff shall be liable either to an action on the case or to an attachment for contempt of court, at the option of either party, whenever it shall appear he hath injured such party by false returns, or by neglecting to arrest the defendant, or to levy on his property, or to pay over to the plaintiff or his attorney the amount of any sales which shall be made under or by virtue of any execution or any money collected by virtue thereof."—*Prin. Dig.* 431. And by the 52d section of the same act it is provided that, "whenever the sheriff of any county within this State shall fail to make proper returns of all writs, executions and other processes put into his hands, or shall fail or neglect to pay all moneys received on such executions, when he shall be required so to do, he shall be liable to an action for contempt, and may be fined, imprisoned, or removed from office, in the manner prescribed by the Constitution."—*Prin. Dig.* 432.

Can it be seriously doubted, that the enactments were designed to make the principal sheriff chargeable for the acts of his deputy? Their contemporaneous construction is conclusive with this court as to their true intent and meaning: more especially as their practical exposition has been acquiesced in by the Legislature for nearly fifty years.

But it is argued that the provisions apply only to the default of the sheriff himself; and that being penal in their nature they should not be strained so as to include under-sheriffs. This idea is founded upon a misapprehension of the proceedings. The sheriff is attached, not because his deputy has collected money on a *fi. fa.* which he neglects or refuses to pay over, but *for his own disobedience to the peremptory mandate of the court to pay over this money himself*. This constitutes the contempt; and the appropriate punishment is awarded for his own default and not for the miscarriage of his deputy. That is a matter which the court decline looking into, leaving the controversy to be adjusted between the parties themselves. When the term arrives to which the *fi. fa.* is made return-

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able, it is the duty of the sheriff to bring the execution into court, with his actings and doings thereon. If money has been collected he must account for it to the plaintiff. If he has appointed incapable or dishonest deputies, it is his misfortune; it is his own voluntary act, and he is clothed with authority to indemnify himself against loss by taking of his deputy ample security. Better far that the courts should supply to the creditor this summary justice, and leave the sheriff to his redress against his faithless or incompetent deputy, than to open a wide door for fraud and collusion between the principal and his subordinate, by driving the party to his action on the bond, which by the way does not at all times afford adequate relief, as the facts which have just transpired under our own eyes abundantly demonstrate. It appears by the sheriff's return to the rule that this money was collected by John A. Drane, the deputy of Stephens, 25th of January, 1840; and the fact is disclosed in the case immediately preceding this, against Stephens and his securities, that in his own opinion as well as that of the Inferior Court of Baldwin county, he had given no sufficient bond from his election in January, 1840, to the 3d of March of the same year. And yet he insists that this creditor shall be compelled to look to this very bond for satisfaction, executed more than one month subsequent to the alleged default of his deputy. Courts are constantly admonished to be cautious how they deprive parties of any remedy afforded them by the wisdom and forethought of the Legislature.

There is a still more appropriate reply to the objection, that these sections of the judiciary should be construed strictly on account of their being penal. If taken *literally* the 52d section includes the identical case under consideration. It declares, that "whenever the sheriff of any county within this State, shall fail to make proper returns of all writs, executions and processes, put into his hands or shall fail or neglect to *pay all moneys received on such executions, when he shall be required so to do, &c.*" It would seem, therefore, that in the estimation of the Legislature it was altogether immaterial *who collected the money*. The liability of the sheriff to attachment and imprisonment, is predicated upon the fact, *of the collection of the money and the failure on his part to pay it over when required so to do*. Indeed this construction is warranted not only by the language, but as we verily believe by the spirit and equity of the act. It may be true, then, that the sheriff is criminally responsible *only for his own acts*, and that this severe remedy is confined to his own default. *That default consists in not paying over money collected on a fi. fa. which has come into his hands—immaterial by whom the money was received, whether himself or his deputy—when required so to do.*

It is conceded that the sheriff was liable, in England, to be attached in certain cases for the misconduct of his deputy. To this point the authorities are numerous and explicit. Can it be believed, that the Legislature, by attempting to enlarge his liability, have actually diminished it? and that by subjecting him to attachment in *other cases* than those recognized by the practice of the English courts, they have relieved him altogether, even in those cases where it is admitted he was before responsible? And yet such is the result of the reasoning which would restrict the clauses of our own law to the *sheriff*, to the exclusion of his deputy, because the latter is not specifically named! Such could never have been the intention of our law-makers. To my mind it

most manifest that their purpose was to tighten the rein, and not to relax it—in other words, to enlarge the doctrine of constructive contempts. It would be singular enough to hold the sheriff liable to this process for the failure of his deputy—to arrest the body of the defendant upon bail process, the object of which is to secure the debt, and not to subject him to the same penalty for not paying over the money when collected on the execution! Such absurdity, we apprehend, is not properly chargeable to the law. If so, it is no longer entitled to the magnificent eulogy lavished upon it by Burke, “as the collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns.”

The sheriff, by the bond which he executes before entering upon the discharge of his duty, obligates himself for the faithful performance not only of his own conduct, but that of his deputies also. And until the act of 1841 was passed, rendering deputies liable for their own default, the public looked to the principal only, and never beyond him. All rules were taken against the high-sheriff, whether for the failure of himself or his deputy, to pay up all moneys received on executions. Sheriffs were in the habit of fraudulently absenting themselves from court, to avoid being ruled. And as the deputy could only be reached through the principal, parties were subjected to great delay and inconvenience. And this was the mischief which gave rise to the act of 1841, making the deputy directly responsible for his own default, *nevertheless* reserving, in express terms, the existing remedies against the principal. It provides, “that all deputy sheriffs shall be liable to be ruled and attached in the *same way and manner as sheriffs*; but the liability of the sheriff shall not be affected by any such proceeding against his deputy, where the same is not effective.”—*Cobb's Analysis*, 123. Strange that an argument should be invoked from this statute in favor of sheriffs! It is a strong legislative confirmation of the doctrine ruled by the court below, and which seems never to have been questioned until recently. It shows clearly that, previous to the passage of that act, the sheriff was liable to be ruled and attached for the acts of his deputy; and it is well known for none so commonly as his failure to pay over money collected on executions. It proves, further, that, since its passage, the liability of the sheriff for the delinquency of his deputy, is in no wise altered, where the proceeding against the deputy is not effective.

If, in the face of the very words of the act to the contrary, it should be decided that, by subjecting the deputy directly to attachment, the sheriff had been exonerated; the evil intended to be cured has been greatly aggravated. The responsibility of the principal is to be preferred, in any view of it, to that of his deputy, if parties can look to *one* only for satisfaction.

Delinquency in regard to *trust* funds has been uniformly treated with marked and merited severity. In this State it is punished by Penitentiary imprisonment; and a party thus in default has always been excluded from the benefit of the bankrupt laws, passed in England and in this country.

We will not say that a sheriff, committed under these circumstances, would not be entitled to his discharge upon proof made that he had exhausted his own property, and that of his deputies and securities, and

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was still unable to respond to the rule. Although the terms of his imprisonment be without bail or mainprize, still one should be strongly inclined to the opinion, that there could be no contempt, actual or implied, under such proof.

But were it otherwise, we could not attempt, for that reason, to make a precedent which would overturn the laws of the land. I would lament that the difficulty existed; still I would be for referring the subject to the consideration of the General Assembly.

Our jurisdiction is large enough as it is: *we must take care not to extend it*; and begin by doing that which our predecessors in the Circuit Courts have never ventured to do, and which our successors on the bench would lament our having done, namely, passed a *judicial ordinance* for abolishing imprisonment in certain cases.

Our opinion is, that the judgment below must be affirmed.

No. 85.—HENRY BADGETT, plaintiff in error, vs. JOHN H. BROUGHTON, defendant in error.

In an action of covenant, for a breach of warranty in selling an unsound negro, the measure of damages is the difference between the price paid, and the actual value of the negro in her unsound condition; and if of *no value*, then the price paid, with interest thereon.

This was an action of covenant, brought by the defendant in error against the plaintiff in error, in the Superior Court of the county of Greene, and tried before Judge Merriwether at September Term, 1846.

The action was predicated upon a breach of the warranty contained in the following instrument:

“GREENE COUNTY, GA., Dec. 12, 1843.

“Received of John H. Broughton, two hundred and seventy-five dollars, in full payment for a negro girl, named Lucinda; the right and title to said slave I will warrant and defend; I also warrant her sound in body and mind. Given under my hand and seal the day and date above written.

HENRY BADGETT.” [L.S.]

The breach alleged in the declaration was, that the said slave, Lucinda, at the time of the making of said warranty, was not sound in body, but on the contrary thereof, was then unsound, by a disease of her lungs, of which, shortly afterwards, she died.

It appeared that, on the 25th day of January, 1844, the defendant in error sold said slave to one Chesley Attaway, and instead of executing a separate bill of sale, endorsed over the original bill of sale as follows, to wit:

“January 25th, 1844.

“For full value received, I hereby transfer the within bill of sale, made by Henry Badgett to me, to Chesley Attaway.

“Test, A. T. Scott.

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Upon the trial, the defendant in error offered the original bill of sale, with the said endorsement thereon, in evidence, which was admitted.

The unsoundness of the slave Lucinda at the time of said warranty and sale, from Badgett to Broughton, and of her death therefrom, was proven.

It was then proven, in behalf of the defendant below, by Chesley Attaway, that he purchased the negro Lucinda from Broughton, and paid him \$275 therefor; that he refused to sign a bill of sale, warranting the title and soundness of said slave, to witness, but agreed to assign the bill of sale which Badgett made to him, and thereupon made the aforesaid endorsement upon the bill of sale, which witness thought amounted to a warranty, but did not know how Broughton understood it. The negro appeared sickly after he purchased her, and continued so until August following, when she died.

The testimony having been closed, the court below charged the jury that, as he understood the decision of the Supreme Court, the question to be considered was, whether the defendant below had kept his warranty? If he had not, then the plaintiff below was entitled to recover, and under the evidence, the purchase-money was the measure of damages, and a transfer of the bill of sale to a third person, and the receipt from Attaway by Broughton, of a sum of money equal to the original purchase-money, did not discharge the warranty of the plaintiff in error. The jury found a verdict for the plaintiff below for \$275.

To which charge and opinion of the court below, the plaintiff in error excepted.

FRANCIS H. CONE, for the plaintiff in error, contended,

1st. That the plaintiff below could not recover, as he had sustained no damage; at most he can recover only nominal damages.—8 *Porter R.* 428; 1 *Halsted's R.* 251; 3 *Stewart & Porter R.* 329; 1 *McCord R.* 379; 1 *Taunton*, 566; 3 *Starkie's R.* 32; 1 *Nott & McCord*, 326, 343.

2d. That the transfer of the bill of sale did not amount to a warranty, and therefore plaintiff below could never become liable to Attaway.—12 *Sergeant & Rawle*, 165; 3 *Haywood*, 186.

DAWSON and McHENRY, for the defendant in error.

By the Court—WARNER, Judge.

In this case, perhaps, the charge of the court to the jury would have been *more strictly* in compliance with the legal rule, had it been stated to them that the measure of damages for a breach of warranty of soundness, in the sale of the negro, was the difference between the price paid and the *real* value of the slave, in her *unsound condition*; or, if she was of *no value*, then the price paid for her, with interest thereon.—2 *Sanders' Pl. and Ev.* 917, and cases there cited; *Curtis vs. Hannay*, 3 *Espinasse*, 82.

From the evidence disclosed by the record, we are of the opinion, the plaintiff below was entitled to recover at least the *price paid* to the defendant for the negro, proved to have been *unsound at the time of the sale, and to have died afterwards*.

The court charged the jury that, "under the *evidence*, the purchase-money was the measure of damages." Had there been a special verdict, finding the same facts as disclosed by the record in this case, we are of the opinion, the measure of damages would have been, in judgment of the law, at least to the extent stated by the court to the jury, and the charge of the court, as applied to the particular facts of this case, is not a sufficient ground of error to authorize the granting a new trial.

It was contended, by the counsel for the plaintiff in error, that the transfer of the bill of sale by Broughton to Attaway did not amount, in law, to a warranty of soundness of the negro, and, consequently, he had not been damaged by his purchase from Badgett.

It will be time enough for us to decide that question, when it shall be properly brought before us by the proper parties. What may be the rights acquired by Attaway, under the transfer of the bill of sale to him by Broughton, we decline to express any opinion, for the reason, he is no party to this suit, and is not now before the court. Certainly, the liability of Badgett, on his contract of warranty, is not dependent on the liability of Broughton to Attaway, on a contract subsequently made between them for the sale of the negro.

Did Badgett warrant the negro to be sound when he sold her to Broughton? Was she sound *at the time of the sale*? If not sound, what was her value in her unsound condition? These were the legitimate inquiries for the jury, on the trial of the cause between Broughton and Badgett.

Let the judgment of the court below be affirmed.

THE CENTRAL BANK OF GEORGIA, plaintiff in error, *vs.* WILLIAM
WHITFIELD, defendant in error.

Demand and notice is not necessary to charge an endorser, in a suit against him, in favor of the Central Bank.

The plaintiff in error brought an action in Putnam Superior Court, against the defendant in error, as endorser of a note for \$600, payable at the Bank of the State of Georgia, Savannah, made by G. B. Allen, and endorsed by said William Whitfield and one James Griggs. The defendant pleaded the general issue, and also, that the plaintiff had obtained the note fraudulently. The case was tried on the appeal, which resulted in a verdict and judgment, in favor of the plaintiff, for the whole amount due on the note, with costs; whereupon the counsel for the defendant in error moved for, and obtained a rule *nisi* for a new trial, on the ground that the court erred in its charge to the jury, "that notice was not necessary to charge the endorser on said note;" and because the jury for contrary to law. There was no evidence of fraud on the part of

plaintiff in obtaining said note, and the only question before the court was, as to the notice.

At September term, 1846, of the court below, the rule for a new trial came on to be heard before Judge Merriwether, who, after argument of counsel, decided, that notice was necessary to charge the endorser, the said note having been deposited at a chartered bank for collection, and therefore granted the new trial moved for.

To which decision the counsel for the plaintiff in error excepted.

PULASKI S. HOLT, for the plaintiff in error,

Relied upon the charter of the Central Bank of Georgia, and upon the case of *the Merchants' Bank of Macon vs. the Central Bank of Georgia*, (ante, p. 418.)

J. M. ASHURST, for the defendant in error, contended :

1st. At common law, notice is necessary to charge the endorsers of bills of exchange and promissory notes.—*Chitty on Bills*, 465-6; 1 *Strange*, 441, 469, 515; 2 *Blackstone's Rep.* 749; 2 *Strange*, 1087; 1 *Term Rep.* 170; 4 *Cranch*, 141; 7 *John. R.* 361; *Story on Promissory Notes*, 345, and note 2.

2d. By our own statute, endorsers of notes payable at, or intended to be negotiated at a bank, are entitled to notice.—*Prince's Dig.* 462.

3d. In this case, the note being sued on by the Central Bank, it is contended that notice is not necessary to charge the endorsers, on account of the provisions of its charter.—*Prince*, 74-5. Let us examine those provisions, by the rules of construction laid down in the books. And 1st, in the construction of one part of the statute, every other part ought to be taken into consideration.—6 *Bac Abr.* 380. 2d. If different parts of a statute refer to the same thing, they all ought to be taken into consideration in construing any part of them.—*ib.* 382. 3d. It is an established rule, that all acts *in pari materia* are to be taken together as if they were one law.—*ib.* 4th. As to what four things are necessary in the construction of a statute, see *ib.* 383. 5th. The intention of the makers of a statute ought to be taken into consideration in its construction.—*ib.* 386. 6th. In this case the statute ought to have an equitable construction.—*ib.* 386.

4th. The note sued on in this case was endorsed with the express understanding that it should be discounted at the Branch Bank of the State of Georgia at Eatonton, where notice was necessary; and by mistake of the maker, without the knowledge of the endorser, it was discounted at the Central Bank. Shall it be said, that a legal fraud can thus be practiced upon the endorser of an accommodation note, and that his legal rights and liabilities can thus be changed without his privity?

5th. The plaintiff in error sent the note for collection where it was made payable, and it was there protested. Will the court put such a construction upon the statute as to make the Central Bank the general collecting agent of all notes upon which the endorsers have been discharged by the laches of the holders.

6th. The note was protested at the State Bank in Savannah, and notice thereof was not given according to law.

By the Court—NISBET, Judge.

The only question made in this case is, whether under the charter of the Central Bank of Georgia, demand and notice is necessary, to charge an endorser? We have determined that they are not, in the case of *The Central Bank vs. The Merchants' Bank*, argued at Decatur last August. And as we have nothing to add to or take from that opinion, we find it only necessary in this case to refer to it.

No. 87.—ISAAC L. ANDERSON, and LUCINDA, his wife, plaintiffs in error, vs. HENRY BAKER, defendant in error.

To constitute a valid parol-gift of a chattel, there must be an immediate delivery of the same by the donor to the donee.

The bare declaration of the donor, that "she had given certain negroes to the donee, and had no right to sell them," is not sufficient to pass the title to the donee, without evidence of *some act*, from which the jury may presume a delivery of the property, where the donor remains in possession of the property, exercising dominion over it until her death.

This was an action of trover for several slaves, Phebe and her children, brought by the plaintiffs in error against the defendant, in Warren Superior Court, and was tried on the appeal, before Judge Sayre, at October Term, 1846.

The conversion of the slaves by the defendant, and their value, with the value of their hire, was proven.

Nancy Baker was examined by commission, in behalf of the plaintiffs, who testified, that some time in the year 1834, Mrs. Elizabeth Williams, former owner of the slaves sued for, requested her to give to her daughter Lucinda, (wife of plaintiff,) as an adopted child, promised to send her to school, and did so, and manifested affection for her; and in the same year said *she had given her Phebe and her children*. The conversation was at Mrs. W.'s residence. The negroes remained in the possession of Mrs. W. up to the time of her death. The witness was disappointed in the will of Mrs. W.; expected that Lucinda was to have the negroes that Mrs. W. said she had given to her; heard Lucinda express disappointment at the contents of Mrs. W.'s will, but never heard her say that she expected the negroes, Phebe and children, to be given her in said will; heard Lucinda say, since Mrs. W.'s death, that she had heard that Mrs. W. had in a will, written by William Harris, left her the said negroes. Witness was the mother of the plaintiff Lucinda.

Amanda Brown was also examined by commission, in behalf of the plaintiffs, who testified that she had heard Mrs. W. say, that Curran Battle wished to buy *Semanson*, a son of Phebe, but that she had no right to sell him, because she had given him to said Lucinda. This was after the intermarriage of the plaintiffs. Witness heard Mrs. W., at different times within three or four years before her death say, that she had given Phebe and her children, the negroes in dispute, to the said Lucinda, and that she had adopted her; witness did not hear the conversation between Battle and Mrs. W.; it was in 1838 or '39. The said negroes were then in the possession of Mrs. W., and continued in her possession until her death; often heard Mrs. W. say, that she regarded the said Lucinda as her child, had given her some property and intended to give her more.

Curran Battle was then introduced in behalf of the plaintiffs. He testified that he knew Phebe and her children in 1839 and '40, and went to Mrs. W. to purchase *Semanson*. Mrs. W. refused to sell him, because she had given him, as she said, to said Lucinda, but not by deed of gift. Witness told her she had a right to sell him; she disputed it, and her word was her bond, and she could not sell him, and that at her

Lucinda should have him. Witness had known the negroes for twelve years before the death of Mrs. W.; part of them had been in possession of Mrs. W. from the death of her husband; some of them had been with Alfred Baker in Augusta, in 1837-38-39; witness knew that the plaintiff, Isaac L. Anderson, married the said Lucinda in 1836 or '37; was present at the marriage; Lucinda was then 17 or 18 years of age; after her marriage, she left the house of Mrs. W. who died in 1843.

The counsel for the plaintiffs here closed.

The counsel for the defendant in error, then introduced the will of Mrs. W., which was read, by the first clause of which, the negroes in dispute were given to the children of Henry Baker, the defendant. The will was dated 15th of July, 1842, and admitted to probate, July term, 1843, of Warren Court of Ordinary. The said Henry Baker was admitted to be the duly qualified executor of said will.

Martha Gibson, examined by commission, in behalf of the defendant, testified that said Lucinda stated in her presence, that "if Mr. Gibson had kept the will, she would have had Phebe and children, but as old Henry had taken it, he had it according to his notion." This was on 4th July, 1843.

Thomas Gibson, examined for the defendant by commission, testified that he heard Lucinda say in the fore part of the year 1836, that her aunt, Mrs. W., had left her fifteen negroes in her will. He had witnessed two wills for Mrs. W., one in 1835, the other in 1837. The first he had read in part, and saw that there was a bequest of Phebe and her children to said Lucinda, and he informed her of it. He knew nothing of any gift.

The testimony on both sides having closed, the counsel for the plaintiffs requested the court to charge the jury.

1st. That if the gift was complete in Mrs. W.'s lifetime, her will could not affect the rights of the parties.

2d. That the jury had the right to infer delivery, and every other requisite of a good and valid gift, from the declarations of the donor, "*that she had given the negroes to the donee,*" "*that they belonged to her,*" and "*that she had no right to sell them.*"

3d. That if the jury was satisfied, from the declarations of Mrs. W., that a good and valid gift did take place, such gift was not affected by the possession of the donor subsequent to such gift.

These instructions the court below refused to give entire, but charged in relation to the first of these propositions: "If the gift was complete in the lifetime of Mrs. W., it could not be defeated by her subsequent will." In relation to the second proposition, that it was true, with this qualification, "if such declarations were accompanied, and connected with *acts* of the party giving, distinctly recognizing the rights of the donee, or acts of the donee, with knowledge of the donor, exercising dominion and control of the property without objections from the donor, they were good to prove delivery and other requisites of a good gift."

To which the counsel for the plaintiffs excepted.

In relation to the third proposition, "that if the jury were satisfied from the declarations of Mrs. W., that a good and valid gift did take place, such gift was not affected by the possession of Mrs. W., the donor subsequent to such gift. The court charged, that "this was true

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applied to a perfect gift, that which contemplated words of giving in the present time, followed by actual delivery, or *what was before stated to be equivalent to delivery.*"

To which qualification the counsel for the plaintiffs excepted.

The presiding judge further charged the jury, that bare declarations by a party, that *he had given property*, were not sufficient evidence of delivery to constitute a valid gift, unless there was also evidence of some act on the part of the donor distinctly recognizing and affirming the fact of a gift, to which the declarations applied, as before stated, or some act on the part of the donee, with the knowledge of the donor, appropriating it to her own use and benefit.

To which the counsel for the plaintiffs excepted.

ROBERT TOOMBS and ALEXANDER H. STEPHENS, for the plaintiffs in error.

MR. TOOMBS made the following points :

1st. That parol admissions of a party or privy, are competent evidence of all facts which may be lawfully established by parol evidence.—*Greenleaf's Ev.* 235, 236 ; *ib.* 5.

2d. That declarations of the donor, that she had given, and that "the property belonged to the alleged donee, were sufficient evidence from which the jury might infer all the requisites of a valid gift, without other evidence of any act whatever by donor or donee, and that such declarations are evidence of delivery to be determined by the jury, and not by the court, and that if any act was necessary to the completion of said gift, the refusal of the donor to sell the property for the reasons assigned by her in the record, was sufficient to warrant the jury in presuming delivery.—*Grangiac vs. Arden*, 10 *Johns. R.* 292 ; *Reid vs. Colcock*, 1 *Nott. and McCord*, 592 ; *Brashears vs. Blassingame*, 1 *ib.* 223 ; *Davis and wife vs. the Executor of Davis*, *ib.* 224.

F. H. CONE, C. J. JENKINS, and T. R. R. COBB, for the defendant in error.

MR. JENKINS submitted the following points and authorities :

1st. Counsel cannot rely upon an omission, on the part of the court below, to charge upon a point, concerning which he was not required to charge, and which is not embraced in the bill of exceptions.

2d. A bare declaration, that a party *had given*, unaccompanied by some act equivalent to delivery, is insufficient to support a claim of title to personal property. And the act or acts relied on to supersede the proof of delivery, must amount to an abandonment of dominion by the donor, or its assumption by the donee, with the knowledge and acquiescence of the donor.

3d. It is the province of the jury to determine whether the circumstances in proof, show a voluntary abandonment on the one part, or permissive assumption on the other, of the dominion, or are tantamount to delivery, and it is their duty to consider in connection with these countervailing circumstances adduced on the other side, and if the jury were correctly instructed as to the law, this court will presume that they have properly applied it to the circumstances in evidence.

4th. Apart from the question of delivery, the jury were instructed, that if they found that there had been a verbal gift, qualified by the reservation of a life estate to the donor, the gift is invalid, and if there was testimony to establish that qualification, the verdict should be sustained.—2 *Black. Com.* 441-2 ; 2 *Kent Com.* 354 ; *Strange R.* 954 ; 2 *Ves., Sen.*, 431 ; 2 *Johns. Rep.* 52, 726 ; 18 *ib.* 145 ; 2 *Barn. and Ald.* 551 ; 7 *Taunt.* 224 ; 2 *Gill and John. R.* 208 ; *Hammond's R.* 737

Leigh's R. 337; 1 *Nott and McCord*, 218, 239; 2 *Ala. R.* 117; 1 *Stewart and Porter*, 56; 6 *Randolph*, 135, 541; 4 *Harris and McHenry*, 537; 2 *Bailey*, 588; 1 *Jarman on Wills*, 11, 12, 13; 3 *Dev. R.* 171, 263; 2 *Taylor's R.* 274.

MR. CONE, in conclusion.

In this case, the plaintiff seeks to recover the slaves in controversy, on the ground of a parol-gift made to the wife of plaintiff by Mrs. Elizabeth Williams, in her lifetime, and of whose last will and testament the defendant is executor, and in that capacity the negroes came into his possession.

The recovery is resisted on two grounds:

1st. That the property never was delivered to the donee, nor did Mrs. Williams, in her lifetime, ever relinquish her dominion over it.

2d. If any gift was ever made, that the evidence shows that it was not to take effect until the death of Mrs. Williams, and was therefore void as a gift *inter vivos*.

As to the first point: Delivery is essential to perfect and render valid a parol-gift of personal property.—2 *Blackstone's Com.* 441-2; 2 *Kent's Com.* 354; *Strange Rep.* 954; 2 *Vesey, Senr.*, 431; 2 *Johns. Reps.* 52; 7 *ib.* 26; 10 *ib.* 293; 17 *ib.* 301; 18 *ib.* 145; 2 *Barn. and Alderson*, 551; 7 *Taunton*, 224; 2 *English Com. Law Rep.* 81, S. C.; 9 *Vesey*, 1; 12 *Vesey*, 39; 2 *Gill and Johnson*, 208; *Hammond's Reps.* 737; 1 *Hill's Rep.* 13; 3 *Hill*, 254; 2 *Leigh*, 337; 1 *Nott and McCord*, 239; 14 *Johns. Reps.* 222; 2 *Alabama Rep.* 117; 1 *Stewart and Porter*, 56; 1 *Randolph*, 135, 541; 4 *Harris and McHenry*, 537.

As to the second point—2 *Bailey*, 588; 1 *Jarman on Wills*, 11, 12, 13.

MR. TOOMBS, in conclusion, for the plaintiffs in error.

LUMPKIN Judge, having been originally of counsel, gave no opinion.

By the Court—WARNER, Judge.

This case comes before us on a bill of exceptions to the charge of the court below to the jury on the trial of the cause.

The counsel for the plaintiffs in error requested the court to instruct the jury that they had the right to infer delivery, and every other requisite of a good and valid gift, from the declarations of the donor "that she had given the negroes to the donee, that they belonged to her, and she had no right to sell them;" which instruction the court refused to give as requested, but instructed the jury—"If such declarations are accompanied and connected with acts of the party giving, distinctly recognizing the rights of the donee, or acts of the donee, with knowledge of the donor exercising dominion and control of the property, without objection from the donor, they are good to prove delivery and other requisites of a good gift."

By the common law, to make a valid gift of personal chattels, there must be an immediate possession of the thing delivered to the donee.—2 *Black. Com.*, 441; 2 *Kent's Com.* 438; *Noble vs. Smith*, 2 *John. Rep.* 52. Do the declarations of the donor, "that she had given the negroes to the donee, that they belonged to her, and she had no right to sell them," authorize the jury to find there had been such a delivery of the property as required by the common-law rule, when the donor has continued in the possession of the same, and exercised the dominion over it? We think not, and concur in the opinion of the court below.

that there must be some *act* done by the donor from which a delivery may be presumed; and that the bare declaration of the donor that she had given the property to the donee is not sufficient. There must be some evidence that the donor has parted with the *dominion* of the property.

We do not hold an actual manual delivery is necessary to constitute a valid gift, but there must be some *act* shown, from which the jury would be authorized to infer there has been such a delivery of the property as the subject-matter of the gift would authorize. Where the gift is made to an infant, of a negro, and the donor hires out the negro in the name of the donee, and for his benefit, this would be such an *act* on the part of the donor, coupled with the declaration he had given the negro to the donee, as would authorize the jury to presume there had been an abandonment of the dominion of the property by the donor to the donee. So, the declarations of the donor in this case that she had given the negroes to the donee, with the addition that *she had delivered her possession of them*, would have been *prima facie* evidence of the fact.

The argument for the plaintiffs in error insisted, that where it was proved by the declarations of the donor that *she had given the negroes to the donee*, it was a presumption of law that all the requisites necessary to constitute a valid parol-gift had been complied with, notwithstanding the possession of the property remained in the donor until her death. One reason given why a parol-gift of personal chattels is not valid by the common law, without delivery of possession is, that the *locus penitentiae* remains to the donor. Although the donor has said he will give, or has given the property to the donee, yet, if he repent of the gift *before he has parted with the dominion of the property by delivering the possession to the donee*, he has the right to do so, and the title does not pass from him. *Presumptions* may be destroyed by *facts*. In this case, it is shown, Mrs. Williams, the donor, retained the possession of the negroes until her death. Why is not the presumption as fair and legitimate that she repented of the gift which she said she had made to the plaintiff, before parting with the dominion of the property by a delivery of possession, as it is to presume a delivery of the possession thereof from her declarations that she had given the property to the donee?

Possession of personal property is *prima facie* evidence of ownership; and the fact that she retained the negroes in her possession for some years after the *marriage* of the donee, which took place after the alleged gift is proved to have been made, affords strong evidence that she repented of the gift before parting with the dominion of the property, and that there never was a delivery of the possession to the donee so as to vest the title thereto in him.

The counsel for the plaintiffs in error have relied mainly on the following cases, to establish the principle that the jury are authorized to infer a delivery of possession of the property, from the declarations of the donor "that she had given the negroes to the donee," &c.—*Brashears vs. Blassingame*, 1 *Nott and McCord's Rep.* 223; *Davis and wife vs. the ex'rs of Davis*, *ib.* 225; *Grangiac vs. Arden*, 10 *John. Rep.* 302; *Reid vs. Colcock*, *Nott and McCord*, 592.



In *Brashears vs. Blassingame*, the evidence of the gift was the repeated declarations of the father, both before and after the marriage of his daughter, that he had given the negroes to her; and at one time, *when the negroes were seen at work for the daughter at her father's house, he said he had given them up to her.* Afterwards, when the daughter and her husband were about to leave her father's house to go to housekeeping, he made a *formal delivery* of the negroes, together with household and kitchen furniture, to the daughter and her husband *until he should call for them.* It will be seen that in this case there were *some acts*, from which a delivery of the property might be presumed. The declarations were made by the donor when the negroes were in the *employment of the donee*; and there was a *formal delivery* of the negroes, attempted to be qualified by a loan, *until he should call for them*; but the court *repudiated the loan*, and it was competent for the jury to say whether the delivery of the negroes had reference to the gift which he declared he had made of them, or as a loan. Mr. Justice Nott, who delivered the opinion of the court in that case, says, "that a delivery is necessary to perfect a parol-gift of a chattel, is distinctly admitted: without it, there is no gift. When, therefore, the old man said he had given the property to his daughter, he must be understood to have done it with all the solemnities necessary to constitute a gift, and the subsequent possession with his consent, was sufficient evidence of delivery." The learned judge in this case recognizes the common-law rule, that there must be a *delivery of possession*; and that the possession of the negroes by the donee, with the consent of the donor, was in compliance with that rule.

In *Davis & wife vs. ex'rs of Davis*, the court say: "The formal ceremony of a delivery is not essentially necessary. It is sufficient if it appear that the donor intended an actual gift at the time, and evidenced such intention by *some act* which may fairly be construed into a delivery, as in the case cited from *Strange*, where the donee was put into possession by being entrusted with a key, &c. The donor acknowledged he had given the negroes to his daughter, when questioned on the subject, and at a time when *she had one of them in her arms.* This was of itself evidence of a delivery, or surrender of his right to his daughter, and, accompanied with *other circumstances*, might be deemed a sufficient proof of a prior delivery of all the negroes in dispute."

In *Grangiac vs. Arden*, the donor purchased a lottery-ticket, and gave it to his daughter, who was an infant—*wrote her name on the back of it.* The ticket drew a prize of \$5,000, which was paid to the donor, who frequently declared he had given the ticket to his daughter. On one occasion he said Eliza should not divide it with the family, the ticket was her own, and the prize-money belonged to her, and she should have the whole of it, and he *would put it in trade for her.* Some years afterwards the mother of the donee being ill, reminded the donor of the prize-money, and requested him to take care of it for his daughter, when he replied: "*You know the ticket was Eliza's; the money is hers; and I have kept it in trade for her to a good profit; I will never take a shilling of it, or of the profit; she shall have it all.*" The donor declared he would put the money in trade for the donee, and some years afterwards declared *he had done so to a good profit.* In this case

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there were *acts* done by the donor, from which the jury might infer a delivery, independent of the declarations of the donor, such as writing the donee's name on the back of the ticket, and placing the prize-money in trade *for her*, and thereby distinctly recognizing *her dominion* over it, and separating it from the rest of his estate : for if he put the money in trade *for her*, it was not *for himself*.

In *Reid vs. Colcock*, there does not appear to be any acts on the part of the donor, from which a delivery of possession of most of the negroes can reasonably be inferred, (with the exception of Billy,) other than his declarations made at different times ; but Mr. Justice Johnson, who delivered the opinion of the court, places the decision on the ground that the rule has been fastened on them by the decisions of the courts in that State, "beyond the means of loosing the fetters without too much violence to the system." In delivering the opinion of the court in that case, he avails himself of the occasion to remark : "I have always regarded parol-gifts to children, unaccompanied by a distinct delivery and possession, with great jealousy ; and always feel it my duty to caution the jury not to support them, except on the most satisfactory proof ; and if I were now called upon to say what the law should be, I would unite heart and hand in rejecting them."

Shall this court adopt a rule of decision for the government of all similar cases, which it might have occasion hereafter as deeply to regret, as the learned judge whose opinion has just been quoted ? Or shall we adhere to the common-law rule, which requires evidence of *some act* on the part of the donor, independent of his or her declarations, that he or she had given the property to the donee, from which a delivery of possession may legitimately be inferred ? We are of the opinion the integrity of the common-law rule will best be maintained, by requiring proof of some act on the part of the donor from which a delivery may be presumed ; or at least a distinct declaration on his part, that there had been a delivery of the possession of the property to the donee. The bare declaration by the donor, that he or she had given the property to the donee, is not sufficient in our judgment to authorize a jury to infer that the legal requisites of a parol-gift have been complied with.

There are two distinct facts to be established, to make a valid parol-gift. First, that the donor *has given the property* to the donee. Secondly, that there has been a *delivery of possession* to the donee.

On what principle is it that the fact of *delivery* is to be presumed from the other fact, that the donor said she had *given* the property ? On what principle can it be fairly inferred that the donor, who remains in the possession of the property, has relinquished the dominion of the same to the donee, by proof of the fact that the donor said she had given the negroes to the donee ? Does the fact that the donor declares she *has given* the negroes to the donee, also prove a *delivery* of them to her ? If the fact of delivery is necessarily included in the act of giving the property by parol, then further proof of delivery is not necessary ; but if the fact of delivering the possession is not necessarily included in the act of giving the property by parol, then it would seem there ought to be evidence to establish the act of giving the property

parol on the part of the donor; and evidence of some act going to establish the delivery also, in order to make a perfect parol-gift.

We are therefore of the opinion the instruction given by the court below to the jury in this case, was a fair exposition of the common-law rule, applicable to the facts presented by the record; and was correct, both on principle and authority.—*Pennington, adm. of Patterson vs. Gittings, ex'or, 2 Gill' and John. Rep. 208; Ewing vs. Ewing, 2 Leigh's Rep. 337; Sims vs. Sims, 2 Alabama Rep. 117.*

Let the judgment of the court below be affirmed.

No. 88.—EDWIN R. WARTHEN, plaintiff in error, vs. EDMUND MAY, defendant in error.

The Statute of 24 Geo. 2, c. 44, sec. 1, is of force in the State of Georgia.

For the facts of the case and the errors assigned, the reader is referred to the decision of the Supreme Court.

IVERSON L. HARRIS, for the plaintiff in error.

The sole question presented by the bill of exceptions is, whether *the Statute 24 George 2, ch. 44, relative to suits against Justices of the Peace, is of force in Georgia?*

It is respectfully urged that it is not of force. The colony of Georgia was settled in 1732, and the statute of George was enacted 19 years afterwards. It was enacted by the British Parliament, before the Proprietary government allowed by the charter had become extinct. That charter conferred the right on the corporation to make such laws, &c., as they might deem necessary and convenient, &c., for the space of 21 years from the 9th day of June, 1732, subject, however, to be bound to obey such laws, orders, statutes, &c., as should, from time to time, be made, ordered and enacted for the better government of the Province of Georgia. The Proprietary government ceased in 1752, and Georgia became a Royal Government with a Provincial Assembly.

Had the statute of 24 *George 2* been in existence, when the colony was planted by Oglethorpe, it perhaps with plausibility might be argued that it fell within the reason of the declaration made by Judge Parsons in 2 *Mass. Rep. 534*, "That our ancestors when they came to the new world claimed the common law as their birth-right, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration."

Passed afterwards, and in derogation of the right conferred on the colony to make such laws as suited its condition expressly conferred by its charter, it seems to me that for this reason it is not of force.

Moreover, it is a well-established principle in reference to the effect of a statute passed by Parliament, that after a colony is planted, no statute will operate over it unless expressly named.—1 *Blackstone's Com. 77, edited by Chitty.*

It is said by a late commentator: "Though it is competent to Parliament

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legislate for the colonies, yet a colony is not considered as affected by acts of Parliament passed after its acquisition, and while it is subject to other legislative authority, (whether that of the sovereign in council, or of a local council assembly,) unless it be mentioned in the act by name, or by description, such as the "colonies," or "the West Indies," or unless the act be in its nature obviously intended to affect all our possessions.—1 *Stephen's Com.* 100; *Blankard vs. Galdy*, 4 *Mod.* 225; 2 *Peere Wms.* 75; *Rex vs. Vaughan*, 4 *Burr.* 2434; 1 *Chitty's Com. Law*, 638.

There are no words in the statute by which it can be made to extend to the colony of Georgia.

The decision in the case of *Upshaw*, (*Dudley*, 241,) pronouncing this statute of force, appears to me to beg the question. It furnishes no reason—it cites no adjudication—it exhibits no legislative recognition. Can such a decision be of controlling authority upon this tribunal?

The adopting statute of 1784 (*Prin. Dig.* 570) will not cover with its broad wings the act under examination. The statute of 1784 adopted, 1st, such of the acts of its own *Provincial Assembly* as were not contrary to the constitution, laws, and form of government; 2d, the common law of England; and 3d, such of the statute laws as were usually of force in Georgia, up to the 14th May, 1776.

If within the third division it should be attempted to be included, and under neither of the other divisions can it be embraced, I ask the evidence of the statute (24 *George* 2) being usually of force—indeed of its ever having been in force at all within the period from 1732 up to 14th May, 1776.

Neither a judicial nor legislative recognition within that period can be shown; and unless it can be, it is not of efficacy in Georgia, by virtue of the adopting act of 1784.

The isolated decision in *Dudley* cannot make that statute law—it is without principle or precedent to sustain it; and such a precedent, it is to be hoped, will not in any case be considered as obligatory upon this court.

C. O. McCONNELL, for the defendant in error, insisted :

1st. Justices of the Peace are entitled to notice that an action will be commenced at least one calendar month before the bringing of suit.—24 *Geo.* 2, ch. 44, sec. 1; 2 *Saund. on Pl. and Ev.* 615; 2 *Chit. Rep.* 396; 1 *B. and C.* 11.

2d. Declaration must aver notice, when this action does not lie without such notice.—6 *Com. Dig.* 83; *Gould's Pl.* 176.

3d. Action must be commenced within six calendar months after the injury upon which the suit is founded was committed.—24 *Geo.* 2, ch. 44, sec. 8; 2 *Saunders on Pl. and Ev.* 616.

The charter of the Province of Georgia was granted fifth year of *George* II., A. D. 1732.—*Schley's Dig.* 429.

The statute and common law of England, so far as accommodated to our circumstances, were of force as soon as the State was settled by General Oglethorpe in 1733.—1 *Black. Com.* 109.

All statutes passed in Great Britain subsequent to the settlement of Georgia, (1733,) if applicable to our circumstances, were of force here, previous to the Declaration of our Independence in 1776, (*Prin. Dig.* 570,) (adopting act of 1784,) consequently are now.

The statute of 24 *Geo.* 2, was applicable to our circumstances, and continues to be so to the present day. This statute was framed in 1751, twenty-five years before the Declaration of Independence, and eighteen years after the settlement of the province. (Charter granted in 1732.)—*Schley's Dig.* 429.

Acts enumerated in *Schley's Dig.* as in force, passed since 1733—11 *Geo.* 2, A. D. 1738; *ib.* 374; 24 *Geo.* 2, 1751; *ib.* 380; 25 *Geo.* 2, A. D. 1752; *ib.* 384.

To determine what statutes are in force depends upon opinion and reason—(*Preface to Schley's Dig.* 26, 27); and from the reason and necessity of the

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this statute must have been in force previous to the adopting act of 1784, and since that time.

The only record we have is a decision by the Convention of the Judges of this State, when it was decided that this statute was in force and had been for more than thirty years.—*Leroy Upshaw vs. James Oliver, et al. Dudley's (Geo.) Rep.* 241.

By the Court—LUMPKIN, Judge.

This was an action of trespass, *vi et armis*, brought by the plaintiff in error against the defendant, in the Superior court of Washington county. The cause stood for trial on the appeal, before Judge Gamble, at September Term, 1846.

Edmund May was a justice of the peace, and the complaint alleged against him was, that he had issued an attachment against the property of the plaintiff illegally; the same having been made returnable to the Justice's Court; notwithstanding the sum sworn to was *ninety dollars*—an amount exceeding the magistrate's jurisdiction, which is limited to *thirty dollars*. It was charged in the writ that the property of Warthen had been seized and sold under this process. It was nowhere averred in the declaration, that notice had been given to the defendant previous to the commencement of the suit.

A demurrer was filed to the action and sustained by the court below, on the ground that one month's notice of the suit should have been given under the act of 24 *George* 2.

To this decision of the Circuit Judge plaintiff's counsel excepted, and the single question submitted for our adjudication is, whether the act of 24 *George* 2, ch. 44, sec. 1, is of force in the State of Georgia?

It is contended, on the authority of Blackstone and the elementary writers, that, inasmuch as this statute was passed in 1751—nineteen years after the settlement of Georgia by Gen. Oglethorpe—it cannot be made to extend to the colony unless expressly named therein. And we recognize this as a sound rule of interpretation. It is not pretended that an act of the British Parliament *merely* would bind the provinces. Some have supposed, however, that even where the colonies were not expressly mentioned, yet if from the whole purview of the statute it manifestly appears to have been the intention to include them, such ought to be the construction.

Again: it is urged that this act is not embodied in *Schley's Digest of English Statutes*, of force in this State. I am not aware that the validity of *any* act contained in that valuable compilation has been called in question by our courts. The converse of this proposition, however, is not here. Many statutes, and this among them, have been declared to constitute a part of our law, although omitted in that work. Nor is it easy to perceive why the acts of 11 *George* 2, for the more effectual securing the payment of rents and prosecuting frauds by tenants, and that of 24 *George* 2, ch. 45, for the apprehension of persons in any county, under warrants granted by justices in any other county; should be retained, and that under review rejected. The learned and laborious author, in his preface, puts the adoption of the former upon the fact that they have been in constant use ever since May, 1776. As the record of our judicial decisions does

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extend back to that period, we are unable to form any opinion upon this averment. We have, however, the testimony of the whole bench of the State, that the act of 24 *George 2*, has been in force in Georgia since about the beginning of the present century.—*Upshaw vs. Oliver et al.*, *Dudley's Rep.* 241.

By our adopting statute, passed in 1784, we have incorporated into our code the acts of the provincial Legislature, which were binding on the inhabitants of the colony in May, 1776; and the common laws of England and such of the statute laws as were usually in force at the commencement of the revolution; so far as they are not contrary to the constitution, our laws and form of government. To say what portion of the common or statute laws of England were usually in force in this State at the date designated, is wholly impracticable. Actual usage is the only evidence of adoption in many cases. Hence the importance of the statement in *Dudley*, that the act of 24 *George 2* had been recognized in practice from an early period.

Judge Crawford, *clarum et venerabile nomen*, who delivered the opinion of the convention in the case cited, was a practitioner of law shortly after the passage of our adopting statute, and, consequently, his evidence as well as his judgment sustaining this act are highly important.

The rule of construction respecting British statutes I apprehend to be this: whenever the principles upon which they are founded are foreign to our state of society—the manners and customs of our people—they do not extend to the colonies, though passed prior to their emigration and settlement. And, on the other hand, whenever, from their subject-matter and provisions, they were suited to our situation and circumstances, they have been practically adopted by our courts, although enacted since the settlement of the colonies.—*Palmer et eux vs. Downer*, 2 *Mass. Rep.* 179 n.; *Londonderry vs. Chester*, 2 *New Hamp. Rep.* 268.

Indeed, it will be found by reference to the decisions of the courts in our sister States, that they have assumed to discriminate between the different portions of the same statute; adopting some of the provisions, and rejecting others.

Admitting, then, that there was no particular fact known to the court, from which the adoption of this statute might be inferred, is there anything in it repugnant to our institutions? On the contrary, is not its operation here as salutary as in the mother country? It is at best a stringent rule which subjects *judicial* officers to suit, not for corruption, but an error in judgment *only*. Is it not a most reasonable requisition that the party aggrieved should give one month's notice of his intention to sue, to enable the justice to make amends for the alleged injury, and thus relieve himself from the payment of costs?

This question vitally affects some eight hundred magistrates in the State; and seeing no good reason why they should be deprived of the protection of this most wholesome act, we take pleasure in affirming the judgment of the court below.

No. 89.—In the matter of JOHN J. R. FLOURNOY, Esq., Attorney-General. On error from Washington.

So far as the public is interested in a fine imposed, the Executive remission has the effect to restore it to the individual fined, although it had been paid over to the attorney or solicitor-general, and by him to the county treasurer, before the Executive pardon was granted.

A fine thus remitted, being in the hands of the attorney-general, or other officer of court, unappropriated in the manner prescribed by law, will be refunded under an order of the court, by rule against such officer.

The questions involved in this case were adjudicated in the court below, before Judge Gamble, at September Term, 1846.

For the facts of the case, and the error assigned, see the decision of the Supreme Court.

CHARLES J. JENKINS, for the Attorney-General, relied upon the following points :

1st. It was competent for the attorney-general to receive the note of Edmund Swint in payment of the fine; and that he did so receive it, is evinced by the discharge of the prisoners.

2d. The 4th section of the 14th division of the penal code appropriates moneys received for fines inflicted by the superior courts, to the payment of costs due in criminal cases, in which no individual is made liable therefor, or the person so liable is unable to pay such costs.

3d. The fine in this case was evidently so appropriated, the attorney-general having received the note of a third person, and the prisoner thereupon having been discharged.

4th. The pardoning power cannot be exercised to divest a vested interest.

5th. The Executive pardon cannot be exercised after the sentence of the law has been fully executed.

And cited the following authorities :—2 *Bay's R.* 565; 1 *Nott and McC. R.* 26; 4 *Washington C. C. R.* 64; 10 *Wheaton's R.* 246.

C. O. McCONNELL, for the defendant in error, insisted :

1st. That the decision of the Superior Court was according to law.

2d. The judge of the Superior Court was compelled to obey the order of the Governor, who had the right to remit the fine imposed on the defendant, by the power vested in him by the Constitution of this State—Art. 2, sec. 7.

3d. The judge had power to order the credit to be made upon the note given to the attorney-general for the payment of the fine assessed by the court; for the court has control over its own officers.—*Starr and Rice vs. Vanderheyden*, 9 *Johns. R.* 253; *Ex parte Prankard*, 3 *B. and A.* 257 (S. C.); *Ex parte Fisher*; 1 *Chitty R.* 694; 2 *Petersdorf*, 513; 6 *Taun.* 105.

The attorney-general could not legally enter into a contract with a private individual to pay a fine in this manner.—14th *Division Penal Code*, sec. 24. Consequently it would be a matter over which the judge had a right to exercise summary jurisdiction.

4th. If the act of the attorney-general be a legal act, and binding, it would take away the power of the Governor to remit any part of a sentence, vested in him by the Constitution.

By the Court—NISBET, Judge.

Two men, by the name of Croam, were tried before the Superior Court of Washington County, and convicted of a riot.

The court fined them twenty-five dollars each, and committed them to the custody of the sheriff until it was paid. The costs of the prosecution were paid in cash, and a note, made by a third person to the Attorney-General, for fifty dollars, was received by him in payment of the fine, and the criminals were discharged. Subsequently, the Governor remitted the fine of one of them, and a rule was taken calling upon the Attorney-General to show cause why he should not credit the note with the twenty-five dollars thus remitted. He showed for cause, the execution of the note as stated, and the discharge of the criminal, and that the Executive order, being directed to the sheriff, and the prisoner having been discharged, there was nothing upon which it could operate. Upon hearing this rule, the presiding judge determined that the Governor had the power to remit the fine, and that the Attorney-General credit the note with the amount remitted, to wit, twenty-five dollars; and farther, that if the money had been paid over to the county, it would be compelled to return it to the defendant.

To these decisions the Attorney-General excepts.

We do not question the power of the Executive to remit fines, for it is expressly conferred in the Constitution of the State.—*Prin.* 908. The question here is, as to the effect of the remission, under the circumstances of this case.

It is claimed by the counsel for the plaintiff in error, that the pardoning power cannot be exerted, after the sentence of the law has been fully executed. This position seems to be sound as to cases where the sentence is in the form of a personal punishment, as confinement in the penitentiary. In that case, so far as the pardon affects the sentence, after it has been fully endured, it would be absurd to ask, and ridiculous to grant it. If granted, it might subserve the end of some restitution of character, but so far as the punishment is concerned, it would be *brutum fulmen*. Such a thing as a pardon after sentence of punishment executed, I have not known. At first view, the same absurdity attaches to the idea of remitting a fine, or forfeiture, after the one has been paid, and the other taken effect. The cases are very different.

The effect of a pardon is, to restore the citizen to the condition in which he was before conviction; it proceeds upon the idea of innocence. The power is given to the Executive to relieve against the possible contingency, under all systems of laws, of a wrongful conviction. And as all good governments are founded upon essential equity, the sovereign authority will not permit, so far as it can be prevented consistently with the maintenance of general laws, injustice to be done.

The remission of a fine reinstates the citizen in that condition as to the offence, and the consequences of conviction, which he occupied before conviction, and it is practicable, in case of fines and forfeitures, to do this after the sentence is fully executed. That is, it is practicable to return to him a fine after it has been paid. This we lay down as the general rule; we mean to say that the effect of the Executive order

remitting a fine, is to entitle the citizen to a restitution of it. This proposition, however, we believe, is subject to this limitation, to wit: the remission of a fine or forfeiture, cannot divest an interest in either, which, by law, has vested in an individual or corporation, or any body of citizens, constitutionally. So far as the public is interested in a fine, the Executive remission has the effect to restore it; but so far as the citizens have a vested right in it, it is beyond the power of the Governor. There is no such limitation to the pardoning power, in our State Constitution. In other State constitutions, as in South Carolina, this limitation is found. We think, however, that although not found here, it exists.

By the Constitution of the United States, the States are prohibited from passing any law, impairing the obligation of contracts. This inhibition has, by repeated adjudications of the Supreme Court, been held to extend to contracts made by operation of law, between a State and a citizen. If the State, by an act of the Legislature, has appropriated a fine, or any part of it, to a citizen, she has made with him a contract, by virtue of which a right to the fine vests, and she cannot impair the obligation of that contract. She cannot revoke the vested right, neither by an act of legislation, nor by a power delegated, under her constitution, to the Executive. So long as the government exists under its present organization, the State Constitutions must be subordinate to the federal Constitution. The inhibition extends to fundamental law, as well as to ordinary legislation.

It is a curious fact, that the Constitution of the Union is silent as to the power of Congress to impair contracts. Notwithstanding, it is not to be presumed, for a moment, that the courts would enforce a law of Congress, which would divest the right of the citizen to his property, except for the public use, upon adequate compensation being provided.

So sacred are these vested rights held—so deeply laid in the primary elements of government—so essential to social order, and so indispensable to freedom—that they seem to occupy a place in the estimation of civilized states, anterior to, and above, constitutions and laws.

The Supreme Court of the United States, in *Wilkinson vs. Leland et al.*, reported in 2 *Peters*, 657, through Mr. Story, upon this subject, speak as follows:

“That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of free government seem to require, that the rights of personal security and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people.”

— In *Terret et al. vs. Taylor et al.*, 9 *Cranch*, 43, it was held by the Supreme Court, that a title made by the Legislature to any corporation or person, is irrevocable, and that a different doctrine is inconsistent with the great and fundamental principles of a republican government. In the case named above, the court farther say: “We know of no case in which

a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power, in any State in the Union."

The principles decided in these cases, apply to the case before us: the great principle settled is, that a right vested cannot be revoked. This is indeed a common-law doctrine. In England, a limited monarchy, and without a written constitution, the crown cannot recall a right vested. The king has the power to remit a forfeiture, but that power cannot revoke a moiety of the forfeiture, which by law is given to a subject.—*The King vs. Amery, 2 Durnf. and East, 569.*

This question has been considered in our sister State of South Carolina more than once.—See 1 *Nott and McCord, 26* ; 2 *Bay, 565.* The former of these cases involved, with remarkable identity of facts, all the points made in this case. There was a conviction for retailing spirituous liquors without license ; a fine, and a rule against the sheriff to show cause why he had not collected the money.

He showed for cause, that the Governor had remitted the fine. One half the penalty by law went to the informer, and the other half to the commissioners of the district, for the repairs of roads and bridges. The Court of Appeals ruled, that the effect of the remission, so far as concerned the commissioners' moiety, was to arrest the collection of the fine ; and so far as concerned the moiety going to the informer, his right to that had vested and could not be divested. Another point was settled, in the Carolina case, to wit : that the commissioners acquire no rights in the fund, but are to be considered as agents of the State. We shall see that a similar question occurs in this case. So, also, the Secretary of the Treasury, authorized by Congress to remit, in certain cases, the condemnation of goods seized and libeled, for violation of the revenue laws, has been held by the Supreme Court empowered to remit only one moiety, to wit, that which goes to the government, the other moiety, which is by law given to the collector and other officers of the custom-house, he cannot remit.—10 *Wheat. 246.* See also, 4 *Washington's C. C. 447.*

In this case, the money raised by the sentence, or rather its equivalent, a promissory note, received by the Attorney-General in lieu of the money, had never passed from his hands ; he is an officer of the court. The fund was therefore within reach of the court. It could lay its hand upon it and return it to the defendant. It had, in this summary way, the right to determine the questions made by the record.

Now, let us inquire what disposition the law makes of fines, and see whether the fund in question belonged to the State, or whether it, or any part of it, belonged to, and had vested in, the Attorney-General. According to the principles announced, that part of it, if any, which is by law due to the public, is remitted, and that part which by law, if any, vests in a citizen, is not remitted.

The money raised by fines, is by law applied first to the payment of the costs which accrue upon indictments which are ignored by the grand jury ; upon criminal trials which result in acquittal, and which are due upon convictions, when the defendant is insolvent.—(See 4 sect. of the 14th division of the penal code.) At the end of each term, the officers of court, the Attorney-General included, are required to make out and

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present their account for such costs, and an order is passed that they be paid, out of a fund thus made up of fines and forfeitures.

Whatever balance of that fund may remain, after paying these accounts, is directed by the law, to be paid over to the county treasurer, to be applied to county purposes, that is, to roads, bridges, &c.

It is claimed, that by operation of these provisions of law, the fine remitted in this case, vested first in the officers of court, and secondly in the Inferior Court for county purposes.

The costs referred to, are chargeable upon an aggregate fund, constituted of fines and forfeitures generally. This record does not show that any such costs were in arrear to the Attorney-General, or any other officer of court; that there had been any order passed directing any such costs to be paid. There was no appropriation of this specific sum or note. It was in the hands of the collecting officer, for the payment over of which he was liable. No right to this, or any specific sum, therefore, vested in him. We are cognizant of the case the record makes, and no other.

If it is, as we believe, a fund which goes to the Inferior Court for county purposes, then does it belong to the State, and the Inferior Court are only the agents of the State to disburse it, for the common benefit. Just as the commissioners, in the case in South Carolina, were held to be public agents. And inasmuch as there were no vested rights in individuals, and as the Executive remission revokes a fine due, or paid to, the State, we do not find any error in the record, and confirm the judgment of the court below.

No. 90.—JOHN G. JONES, plaintiff in error, vs. The STATE OF GEORGIA, defendant in error.

Where one of three defendants, jointly indicted, elects to be tried *separately*, under the provision of the penal code, the trial, as to him, is to be considered in the same manner as if he had been *separately* indicted for the offence; and one of the defendants, not upon his trial, is a competent witness for his accomplice, to prove his innocence.

Where defendants jointly indicted elect to be tried separately, it is the privilege of the prosecuting officer, who asserts the affirmative as to their guilt, to determine who of them he will first put on his trial.

The act of 1833, giving the State half the number of challenges allowed the prisoner, in criminal cases, is constitutional. The right of trial by jury, as used in this State prior to the adoption of the Constitution, is in no wise impaired by that act.

This court will not grant a new trial in a criminal cause, unless some principle of law has been clearly violated, or where there is, manifestly, *no evidence* to sustain the verdict; the more especially, when the presiding judge, in the exercise of his discretion, has refused the application in the court below, when all the circumstances attending the trial must have been fresh in his recollection.

This was an indictment, for the larceny of a slave, found against John G. Jones, the plaintiff in error, Allen Jones, William Adams, and John

son Chambers, tried before Judge Merriwether, in the Superior Court of the county of Wilkinson, at October Term, 1846.

When the cause was called for trial, the counsel for the prisoners announced that they were ready for trial, and that they would *sever* on the trial. The solicitor-general responded, that he was ready in behalf of the State. The prisoners' counsel then inquired which the State designed to try first? to which the solicitor-general replied, that he would first put John G. Jones, the plaintiff in error, upon his trial. Whereupon the counsel for the prisoners then moved the court that Allen Jones be first put upon his trial, and stated as a reason therefor, that he was a material witness in behalf of the defence, and they desired that he should be first tried, in order that his testimony might be used to support the defence. Which motion was overruled by the court.

Whereupon the prisoner, John G. Jones, was put upon his trial; and the jurors being called, a full panel appeared. Dixon Rogers, the first juror called, was sworn on his *voire dire*, and the questions prescribed by the act of 1843, specifying the oath to be administered to jurors in criminal cases, were propounded to him, both of which he answered in the negative. The counsel for the prisoner then moved the court, that the juror should be asked whether he had formed and expressed any opinion as to the guilt or innocence of the prisoner at the bar; which was overruled by the court, and the juror was challenged peremptorily by the prisoner. Afterwards, another juror being called, and sworn on his *voire dire*, and the questions prescribed by the act of 1843 being propounded by the solicitor-general, and the juror answering both in the negative, he was peremptorily challenged by the solicitor-general, for the State, to which peremptory challenge the prisoner's counsel objected; which was overruled by the court, and the peremptory challenge allowed. To which the counsel for the prisoner excepted.

A jury of twelve having been empaneled, and sworn, to try the cause, testimony was adduced in behalf of the State, which proved that the slave, Mariah, the subject of the alleged larceny, was the property of Matthew Owens, the prosecutor, who resided in Florida, and who had purchased her in the said county of Wilkinson, and left her in charge of one John F. Paul, to remain several months, and until said Paul should himself remove to Florida. William Hall proved, that the negro was missing, but did not know how she went off; searched for her, and found her in Bulloch county. James Oliver proved the negro in the possession of the prisoner, in Bulloch county, and that he offered to sell her to Garrett Williams for \$250 00. While in Bulloch with the negro, the prisoner stated, that he had purchased her from said Paul, against whom there was an execution, which Paul had promised to pay out of the purchase-money paid him by the prisoner, but which he did not pay, but ran away, and left the execution unsatisfied; and that he, the prisoner, had carried the negro to Bulloch, where he did not think she would be interrupted by the execution. The prisoner also stated, that the evening before he left home he was in Irwinton, and had a difficulty with an individual; had thrown a brickbat at him, hit him, and supposed that he had killed him; and that he left, to get out of the scrape, and had taken the negro with him, and had staid three weeks at his uncle's, in Emanuel county. That his brother had come down, and informed h'

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that the man with whom he had the difficulty was delirious, and that three of his negroes had been taken for the damages, and that he was afraid to return before the scrape was made up.

There was no evidence on the trial showing the truth of these statements. On the contrary, one witness testified that he did not know that Paul had ever been sued.

The testimony, on the part of the State, having closed, the prisoner proved that he purchased said negro from the said Paul; and the bill of sale from Paul to prisoner was introduced, and read to the jury in evidence. Some part, or all, of the purchase-money was proven to have been paid Paul by the prisoner.

The evidence on both sides having closed, the court below charged the jury, that "if the prisoner had notice of the title of Owens at the time of his purchase from Paul, the jury might infer his guilt; but if he had no notice, he was innocent." The jury rendered a verdict, against the prisoner, of "Guilty."

Whereupon the counsel for the prisoner moved the court for a new trial, upon the following grounds:

- 1st. That the jury found contrary to law.
- 2d. That the jury found contrary to the evidence.
- 3d. That the jury found contrary to the aforesaid charge of the court.
- 4th. That the court erred in not acceding to the motion of prisoner's counsel to direct Allen Jones, a party in the same indictment, there having been a severance on the trial, to be tried first, and before the defendant, John G. Jones; it being stated by counsel in their places that said Allen Jones was a material witness for the defendant, John G. Jones, and that the notice so made was *bona fide*, and for the purposes stated.

The motion for a new trial was refused by the court below; and the counsel for the prisoner excepted.

IVERSON L. HARRIS and KENAN AND ROCKWELL, for the plaintiff in error.

JOHN M. ASHURST, Solicitor-General, for the State.

Argument of Mr. HARRIS, for the prisoner.

The motion in this case below, and denied by the presiding judge, was made before any step had been taken in the trial. No jury, or any part of it selected: no opening by the solicitor-general. The annunciation of the solicitor-general, in reply to a question put by the counsel of defendant below, that he would try John G. Jones first, don't detract from the force of the legal rights of defendant, as well recognized by numerous cases, the tithe of an atom.

Those rights are to have his co-accomplice rendered a *competent* witness, before he is himself put upon trial, if he should desire to have his testimony.

In this case, that testimony was desired; and with a view to its obtainment and in conformity with the uniform practice in the English courts, the motion was made.—See *Rowland's Case*, 21 *English Com. Law*, 471; edition of 1836 of *Roscoe Cr. Ev.* p. 118.

That the motion should have been allowed, is evident from the many adjudications that an accomplice included in an indictment cannot be a competent witness for another joined with him in the same indictment, though they have severed as the statute allows.

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The case decided by C. J. Kent, in 10 *John*. p. 94, in the case of *The People vs. Bill*; *Lafone's case*, 5 *Esp.* 155; *U. S. vs. Henry*, *Wash. C. C. Repts.* 428; *Rex vs. Fletcher*, *Strange*, 633.

It will be urged by the solicitor-general, as he informs me, that it is the right of a person on trial, to call his co-accomplice—and who is included in the same indictment—as a witness; and in support of his competency, he relies on the statement of a principle of evidence by Mr. Starkie, p. 11 of 2d vol. of 2d edition, in the following words: "An accomplice is a competent witness, although indicted with another, if he be not put on his trial."

The authorities cited in support of it are *Bilmore's case*, in 1 *Hale's Pleas of the Crown*, 305; repeated in *Roscoe Cr. Ev.* 117, 118; and in 2 *Russ. Crim. L.*, 597.

The principle stated goes beyond the case.

I am not here to defend the grounds upon which the rule of incompetency has long been placed—*Sto super vias antiquas*.

Allen Jones was an incompetent witness for John G. Jones, until he had himself been first tried, because he was a party to the record. It is, in a tribunal bound to pronounce *the law as it is*, sufficient to say *sic ita lex scripsit*.

It is worthy of remark, that in the court below, the solicitor-general denied the very principle he is now affirming, in resisting the motion there made; and what is equally worthy of note is, that the judge did not place his denial of the motion upon this principle, but on the isolated position that the State had made its election previous to the motion.

The judge below erred in not granting a new trial to plaintiff in error, upon the two grounds, that they found contrary to law and against and without evidence.

John G. Jones held under a bill of sale from Paul, to whom he paid, as the proof shows, a fair and valuable consideration for the negro girl. The negro had been in Paul's possession from May until in August. Jones had a right to presume ownership in Paul of the negro, as possession of personal property is *prima facie* evidence of title.

There is an entire absence of all proof in the case of *any knowledge* in Jones of any claim of property by Owens in the slave. There are no facts in the case to authorize the inference of knowledge by the jury.

Knowledge is an essential ingredient to the crime of larceny in Jones. No force—no surprise, or trick, or device, or fraudulent expedient used in obtaining the possession of the negro.

The negro was legally in the possession of Paul, and was sold and delivered by him to Jones. How, then, could it be a larceny in Jones as to Owens; and there was none as to Paul.

A trespass is involved in every larceny. Unless there be a trespass in *taking* the slave by Jones, there cannot be a larceny in carrying her away to Bullock county, and there offering her for sale.—See 2 *East Pleas of Crown*, 556; 2 *Russel Cr. Law*, 95; *Roscoe Cred. Ev.* p. 469.

If the original taking is not *animo furandi*, a subsequent conversion to the parties' own use will not constitute larceny.—*Leigh's case*, 2 *East P. C.* 694; 1 *Leach*, 411; *People vs. Schuyler*, 5 *Coven*, 572; *Roscoe Cr. Ev.* p. 477.

If a *bailee* of property, as a carrier to whom goods are *delivered* to be conveyed, steals them on the journey, it is not larceny.—1 *Hale Pleas Cr.* 504; *Levy's case*, 4 *C. and P.* 241.

If Paul had stolen (which he did not) the slave Mariah from Owens, the reputed owner, and then *delivered* her (as he did) to John G. Jones—who was no party, under the proof, to the hypothetical case put—and Jones had then carried off the slave *animo furandi*, yet Jones would be no felon to Owens.—1 *Hale Pleas Crown*, 507.

It is a principle of unquestioned authority, that if there be a fair claim of property, or right in the prisoner, or if it be *brought* into doubt at all, the court should direct an acquittal.—2 *East P. C.* p. 659.

All of these legal principles were violated by the finding of the jury, as the transcript of the evidence exhibits no proof whatever authorizing it. And the

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judge committed error in law, by allowing a verdict to stand found contrary to law, as it was without evidence and against evidence.

The verdict, as its name implies, ought to be the very enunciation of truth. When bottomed upon a superficial and partial examination of the testimony, and announcing a result directly repugnant to the evidence as a whole, it is then a verdict contrary to evidence and calls for the interposition of the court. To permit it to stand would bring courts into contempt and render the trial by jury a great public evil.

It matters not as to the discretion of the judge below in granting new trials. His is not a capricious discretion—it must be reasonable—it must be legal, and exercised conformably to legal principles. The abuse of that discretion is a fruitful source of error. If the jury, on the evidence, ought not to have convicted, the judge below should have allowed a new trial. If there be error in either, this court should correct it, because the judge below has made the finding his—has adopted it—and that adoption furnishes both the opinion and decision, which are properly correctable here, and here only.

To refuse to correct erroneous denials of new trials by the judge below, will be to emasculate the powers of this court, and I may add, its virtues, of so much strength, as to render it the mere *umbra nominis*.

Argument of Mr. ASHURST, Solicitor-General, for the State.

1st. It was not necessary for the purpose of defendant, using Allen Jones (who is charged as an accomplice in the indictment) as a witness in his behalf, that he should have first been tried. An accomplice is a competent witness, and may be examined, if he be willing, although he is indicted along with others.—2 *Starkie, Ev. p. 12*.

So an accomplice is a competent witness for his associates, unless disqualified by judgment, when indicted severally.—*ib.*

2d. When several persons are indicted jointly, and sever upon their trial, the State may elect which to try first.—2 *Bailey R. p. 66*.

3d. If the jury found according to evidence in this case, they found according to law. A new trial will not be granted, unless the verdict is manifestly against evidence; nor when the evidence is doubtful and inconclusive merely.—2 *Bailey's R. p. 29*.

4th. What is simple larceny under our statute:—*Prince, 628, 630*.

Was there not evidence by which the jury might infer a wrongful and fraudulent taking of the property?

5th. Has the State a right to peremptory challenge?—*Prince, 66*, and decision of the Supreme Court in case of *State vs. Reynolds*.

6th. The statute which gives the State a right to peremptory challenge in cases of felony, is not inconsistent with or adverse to a fair construction of the 5th section, 4th article of the constitution of Georgia.—*Prince, 660, 912*.

The constitution had reference to the preservation of the right of trial by jury, and does not take from the Legislature the power of regulating the manner of selecting jurors.

Argument of Mr. ROCKWELL, for the prisoner.

1. Previous to statute 33 *Edw. 1. c. 5*, the crown might challenge without showing cause. Since that statute, however, the right of the crown to a challenge without showing cause, has not existed in England. There has been controversy as to the time of showing cause, which is the sort of peremptory challenge mentioned in the books, that is, the right to cause the juror to stand aside until the panel be exhausted. This statute is of force in Georgia.—*Schley Dig. 415*.

The constitution, in providing that the trial by jury as heretofore used should remain inviolate, was intended for the protection of the citizen. The term

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fore used must involve the mode of selecting the jury. If the Legislature can change the mode of selecting, they can as effectually deprive the citizen of the privilege of a trial by an impartial jury, by increasing the right of challenge on the part of the State, and by taking away the right of challenge from the citizen. The Legislature might say, any twelve men shall constitute the jury selected by the sheriff, chosen by the judge, or in any other manner they might choose to point out. Certainly, it would not be pretended any of the cases supposed would be consistent with the trial by jury, as used at the adoption of the constitution. The peremptory challenge, the right of refusing a juror, without assigning any reason therefor, is not considered as allowed by law to the State at the time of the adoption of the constitution. The section of the penal code extending to the State the benefit of ten peremptory challenges in case of felony, it is suggested, is therefore unconstitutional.

2d. An accomplice is not a competent witness for another, when both are joined in the same indictment. This rule rests upon the ground that he is a party to the record. If separately indicted, he is competent. The accomplice becomes competent, however, to testify in favor of another, although joined in the same indictment, whenever the case as to him is at an end. Hence, where several are tried jointly, if there be no evidence against one, the court may be moved to order an acquittal as to him, in order that he may testify in favor of his co-defendant. But if there be any evidence, even the slightest, although this rests in the discretion of the court, such motion will not be granted, because it is the province of the jury to pass upon the sufficiency of that evidence to convict.

If it is sought to use the accomplice as a witness for his co-defendant, and there be evidence against him, the rule is, to apply to the court to have him first tried, and acquitted or convicted, in accordance with the principle that the case as to him must be at an end before his competency can be restored. This record discloses the fact that the negro, the subject of the alleged larceny, was once at the house of the co-defendant, whose testimony was sought to be used. Hence, if all the defendants had been jointly tried, he would not have been entitled to an acquittal, as of course, in order to testify in favor of his co-defendants; and hence the propriety of the course of the counsel in moving to submit his case first to the jury in order to restore his competency. It was the only mode.

3d. The verdict rendered by the jury was contrary to law. The record shows that the defendant had a title to the negro by purchase, perfected by delivery of possession, from a *prima facie* owner, which title was unimpeached; and of course negatived the allegation that the negro was the property of the prosecutor.

The finding of the jury has declared that title fraudulent and void, without the proof of a single badge of fraud recognized by the law. Presumptions are not grounded on a lighter basis in a criminal trial than would be allowed on the common law side of the court in a mere controversy about property.

4th. The verdict was contrary to evidence. The record shows that the prosecutor ordered the negro to be delivered to Paul, whether as agent or *bona fide* owner does not appear. If as agent, the proof was in the possession of the State's witness, but was not produced. The rule of law is, that the presumptions are against a party withholding evidence, and the defendant is entitled to the presumption in his favor, that the negro was delivered to Paul, not as agent, but as the owner particularly, when the circumstance of his retaining possession unchallenged, from May to August, is also taken into account; when it is remembered that Owens decided to leave the negro with the witness originally.

5th. The verdict was contrary to the charge of the court.

The court charged the jury: "If the prisoner had notice of the title of Owens, at the time of his purchase from Paul, the jury might infer his guilt, but if he had no notice, he was innocent."

This charge was based upon the facts proven. The record shows no evidence which fixes upon the defendant a knowledge of any title whatever in the prosecutor. The loose phrase *public notoriety* in relation to the sale, in the cross examination of the witness, was explained to mean the presence of several of the

neighbors. The defendant was not there. The return of the negro to Irwinton, and the absence of any claim interposed by the defendant, is not such a failure to assert his title as will bring him within the rule, that a party silent, when he should assert his right, is bound by his silence. He was not present, nor is it proved that he knew of it. There was no evidence to authorize the inference by the jury, that the defendant was aware of any claim of title to the negro on the part of the prosecutor. Of course there could not be a fraudulent and wrongful taking and carrying away the negro from the possession of the prosecutor. Indeed, there is no evidence that after the delivery to Paul, in May, the negro ever was in possession of the prosecutor.

. *By the Court*—WARNER, Judge.

In this case, the counsel for the prisoner insisted on the right to ask a juror, on his *voire dire*, after answering the questions propounded by the act of 1843, if he had formed and expressed any opinion as to the guilt or innocence of the prisoner at the bar, which was denied by the court. In the case of *Robinson vs. The State of Georgia*, decided during the present term, we held, the prisoner had not the right to ask that question of the juror on his *voire dire*; but if he wished to show the incompetency of the juror on that ground, he must do so before triers, to be appointed by the court, in the manner pointed out by law, as required by the act of 1843;—and now affirm that decision.

The counsel for the prisoner also excepted to the decision of the court below; allowing the solicitor-general peremptorily to challenge a juror, according to the provision of the 15th section of the 14th division of the Penal Code, which declares, "The State shall be allowed one-half the number of peremptory challenges allowed the prisoner."—*Pris. Dig.* 660. The right given to the State, peremptorily to challenge a juror, by the Penal Code of 1833, it is contended is a violation of that clause of the State Constitution which declares, "Trial by jury, as heretofore used in this State, shall remain inviolate." The trial by jury contemplated by the Constitution is, evidently, a trial by a common-law jury, of "twelve free and lawful men, of the body of the county." But it is said the manner of selecting the twelve free and lawful men has been altered by the Penal Code of 1833, and, therefore, the right of trial by jury, as used in this State at the time of the adoption of the Constitution, in 1799, has been violated. Although we are not of the opinion it was the intention of the framers of the Constitution to impose a restriction on the Legislature as to the manner in which a jury of twelve free and lawful men, of the body of the county, should be selected for the trial of offences, yet it does not appear to us that any of the rights of the accused have been taken away or impaired, in a practical point of view, by the provision of the Penal Code of 1833, allowing the State half the number of peremptory challenges allowed the prisoner.

Before the enactment of the statute of 33 *Edward* 1, the king, without assigning any reason, might have challenged, peremptorily, as many of the panel as he thought proper; but since that statute the king was required to show cause of challenge. Such cause of challenge, however, was not required to be shown by the king until the whole panel was gone through; and the defendant was first put to show all his causes of challenge before the king need show any.—5 *Bacon's Ab.* 364-5. Such

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the practice in this State, it is believed, at the time of the adoption of the Constitution, and up to the time of the enactment of the Penal Code by the Legislature, in 1833. That act is entitled, "An Act to *reform, amend and consolidate* the Penal Laws of the State of Georgia." Prior to the enactment of the Penal Code, the prosecuting officer for the State, when a juror was called, instead of putting him upon the prisoner, or showing any cause of challenge whatever, peremptorily set him aside whenever he thought proper to do so, until the panel was gone through, or the prisoner, by being compelled to exhaust his peremptory challenges, had selected his jury. In this way the State, for all *practical* purposes, had, in very many cases, a greater advantage in getting rid of obnoxious jurors than it has now under the Penal Code; and in forcing upon the defendant jurors obnoxious to him, by compelling him to exhaust his peremptory challenges. The right of the State to pass jurors without showing any cause of challenge, we held, in the case of *Sealy vs. The State of Georgia*, and in the case of *Reynolds*, was taken away by the Penal Code of 1833, and half the number of peremptory challenges allowed the prisoner substituted in lieu of it; which, in our judgment, is equally as favorable to the prisoner as the old law, and is not an infringement of the Constitution.

The counsel for the prisoner also moved the court below for a new trial, because the jury found contrary to law; because the jury found contrary to evidence; and because the jury found contrary to the charge of the court. A new trial was also moved for, on the ground the court overruled the motion of defendant's counsel to put Allen Jones, who was jointly indicted with the prisoner, but who elected to be tried separately, on his trial first, for the reason, as was stated, that Allen Jones was a material witness for the prisoner.

By the 50th section of the 14th division of the Penal Code, it is declared: "When two or more defendants shall be jointly indicted for any offence, any one defendant may be tried *separately*, except such offences as require the action and concurrence of two or more to constitute the crime; and, in such cases, the defendants shall be tried jointly."—*Prin. Dig.* 665. The defendants elected to be tried *separately* for the offence with which they were charged; and the indictment and trial is to be considered *several* as to each, as much so as if they had been *separately indicted*. Where prisoners indicted together sever in their defence, we are of the opinion it is the right of the prosecuting officer, who asserts the affirmative as to their guilt, to elect who of them he will first put upon his trial.—*The State vs. Crank*, 2 *Bail. Rep.* 66.

Besides, we are of the opinion, Allen Jones was a competent witness for the prisoner, they having severed in their trial. For the purposes of the trial, they are to be considered as if they had been *separately* indicted for the same offence. An accomplice who is separately indicted for the same offence, may be called as a witness, to prove the innocence of the prisoner.—1 *Chit. Crim. Law*, 605; *Roscoe's Crim. Ev.* 118; 2 *Russell on Crimes*, 597; 2 *Hale*, 281; 1 *Hale*, 305; *The United States vs. Henry*, 4 *Wash. Rep.* 429.

We the more readily adopt this rule, because it will have the effect to abolish a very pernicious practice which prevails in our courts, of including all persons who were present at the commission of an offence

in many cases whether guilty or not, in the indictment, for the purpose of excluding their testimony. Besides, it will open the door for the investigation of truth, leaving the jury to judge of the *credit* to which they may think the witness is entitled.

We are also of the opinion there was evidence from which the jury might have inferred the prisoner's guilt.

It was proved the negro was missing, and the witness who searched for her found her in Bulloch county. It was also proved by another witness, the negro was in the possession of prisoner, in Bulloch county, and that he offered to sell her for \$250 00. In most cases of larceny of this particular species of property, the offence can only be established by circumstantial evidence.

With regard to the prisoner purchasing the negro from Paul, which was insisted on, by way of defence, the jury may not have believed the witnesses. They may have been of the opinion it was all a concocted arrangement between Paul and the prisoner, to deprive the prosecutor of his property, *wrongfully and fraudulently, with intent to steal the same*. It was the peculiar province of the jury to judge of the evidence; and they have found the prisoner guilty; and we are not prepared to say there was *no evidence* in support of their verdict. Besides, the presiding judge before whom the cause was tried, and who is presumed to have been familiar with all the facts and circumstances which transpired at the time of the trial, has, in the exercise of his discretion, refused the motion for a new trial in the court below; and it must be a very clear case of *error in law*, or a very naked, bald case as to the *facts*, which will authorize this court to control that discretion in a criminal cause, where the jury are made both the judges of the law and the facts.

We are, therefore, of the opinion there is no error in the record, and that the judgment of the court below be affirmed.

No 91.—KINCEN P. BOON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

The act of 1843, prescribing the questions to be propounded to the juror upon his *voire dire*, is constitutional and valid.

The State is entitled to the ten peremptory challenges allowed by the penal code of 1833.

After a juror has answered in the negative the questions propounded by the act of 1843, it is competent for the prisoner to put him upon *trials*, for the purpose of showing that he is not indifferent; and the formation and expression of a *decided* opinion, as to the guilt or innocence of the prisoner, is a disqualification, notwithstanding it be founded on rumor or hearsay; and it is not necessary to prove personal prejudice or ill-will to the accused. It will be inferred from a *deliberate* opinion of guilt, once declared.

the points decided, see the opinion delivered by the Supreme Court.

F. H. CONE and Y. P. KING, for the prisoner.

JNO. M. ASHURBY, Sol. Gen. for the State.

By the Court—LUMPKIN, Judge.

This case comes up by writ of error, to a judgment of the Superior Court of Greene county, whereby the plaintiff in error was sentenced to be hanged for murder. In it, it is alleged that errors have been committed by the Circuit Court, in affirming the constitutionality of the act of 1843, which prescribes the form of the oaths to be administered in a criminal case to a juror, upon his *voire dire*, in allowing the State ten peremptory challenges, under the penal code of 1833; and in refusing permission to the prisoner to go before triors, for the purpose of proving by witnesses that one of the jurors was incompetent, by reason of his having formed and expressed an opinion, from hearsay or report, in regard to the guilt or innocence of the prisoner, notwithstanding he had answered in the negative both of the questions propounded by the act of 1843.

As to the constitutionality of the act of 1843, we are clear that Judge Merriwether, before whom this case was tried, was right; and we have no difficulty in affirming his judgment on that point. It is entirely competent for the Legislature to prescribe what questions shall be asked the juror upon his *voire dire*, for the purpose of ascertaining whether or not he be indifferent. Nothing more is attempted by this statute. Indeed, this ground having been virtually decided, during the present term, in the case of Luke Robinson *vs.* The State of Georgia, it has been abandoned in the argument.

We concur, too, with the court below, on the second objection, and hold that the penal code of 1833, allowing ten peremptory challenges to the State, is no infraction of the 5th section of the 4th article of the constitution of Georgia, which declares that "trial by jury, as heretofore used in this State, shall remain inviolate." *John G. Jones vs. The State of Georgia*, argued and determined at this session, has settled that point. It is conceded, that "trial by jury, as heretofore used," means something more than a trial merely, by twelve men, regardless of the mode by which they may be selected. It protects the accused against the passage, by the Legislature, of any law which would materially trench upon his rights, or endanger his safety, by depriving him of any of those privileges guarantied by the common law. In 1798, when the present constitution was adopted, containing this provision, no man's life or liberty could be touched, for any offence whatever, unless found guilty on two trials, and by the verdicts of twice twelve men, or two juries, against him; that is, one to find the bill or charge to be true; and the other on the merits, to decide on full and legal proof adduced on both sides. And while we admit it is in the power of assembly to pass any act regulating merely the mode of trial by jury—provided that, in doing so, they do not destroy, or materially impair, the right—we should feel constrained to disregard any act which would deprive the citizen of the benefit of the security to which we have just alluded; and this case is put by way of illustration. The ten peremptory challenges allowed by the penal c

is, after all, but an indifferent substitute for the common-law right of passing by the whole list, until the panel was exhausted; and such was the view taken of the matter by this court, in *Sealey's* case, determined at Americus.

The other question is one of paramount interest, and is simply this: Does the formation and expression of an opinion, by the juror, as to the guilt or innocence of the prisoner—from hearsay or report—evidence such a state of mind as to render him incompetent to try the cause? This point is one, we repeat, of great nicety and importance, involving, as it does, the life and liberty of the citizen, on the one side, and the duty of vindicating violated law, on the other. Courts find it exceedingly difficult in practice to adhere rigidly to the rules regulating criminal trials, in Great Britain. It has been well remarked, that amid the crowded population and busy pursuits of a community like England, divided, too, into classes, which take, perhaps, no very lively interest in each other's fate or concerns, and, it may be added, where the frequency of crime deprives it of the power to produce much public excitement, and where, moreover, comparatively few newspapers are published and circulated, it may not, perhaps, be very difficult, under these circumstances, to find a jury unaffected by rumor. But in an agricultural community like ours, of sparse population, identical pursuits, equal station, infrequent crime, and newspapers scattered far and wide, through all the length and breadth of the land, it has always been found a matter of much delicacy and difficulty—sometimes altogether impracticable—to procure a jury entirely unaffected by rumors, touching the transactions of a criminal nature upon which they are called to pass. Hence the continual effort, both on the part of the Legislature and of the courts, to *warp* the ancient rules of the law upon this subject. How desirable, then, it is, for this court to adopt some course which, while it preserves inviolate the principle that a jury shall be above all exception, will nevertheless accommodate itself to the times and the country, and secure both an impartial and successful administration of the laws.

To accomplish this end, all that is necessary, in our humble opinion, is fairly to interpret and honestly to administer the law as it now stands. Our Legislature has placed this matter upon the true footing. By the penal code of 1833, the first question propounded to the juror was; "Have you formed and expressed any opinion, in regard to the guilt or innocence of the prisoner at the bar?" Upon answering this interrogatory affirmatively, it was considered, *per se*, a principal cause of challenge, and the juror, without further inquiry, was pronounced incompetent, by the court, to sit on the trial of the cause. The Legislature, pressed by the inconvenience of making up a criminal jury, in many cases, concluded that an affirmative answer to the above question, ought not necessarily to disqualify a citizen from serving on the trial; that this opinion, which the juror is constrained to acknowledge he has expressed, might nevertheless have been, and, no doubt, often was, uttered, under circumstances which, when inquired into, would evince, to the satisfaction of all, that it constituted no sufficient objection to the juror; that, in fact, opinions were often *expressed*, which could not be properly said to have been *formed*, and which would readily yield to testimony offered in opposition to them. Consequently, the power of disposing of a juror thus summari-

ly, has been taken from the courts and referred to a *quasi* jury, composed of citizens of the county, before whom the nature and cause of the opinion shall be inquired into. And if it appear, from the answers of the juror himself, or from other testimony, that he has formed and expressed an opinion of the defendant's guilt, out of ill-will or personal prejudice to the prisoner, or that he has such deep impressions or fixed opinions of the defendant's guilt, as will probably prevent him from rendering a fair verdict, he will be found not an indifferent juror, and challenged for cause. If, on the other hand, the opinion he has expressed was a mere transient impression, so light and evanescent as not to be recollected frequently by the party himself—an opinion which takes its hue from the conversation of the last person present with whom he happens to talk, relative to the reports in circulation, evidently free from all settled bias, and resting upon no firm foundation—such a juror would do the accused justice, and would be found qualified by the triors.

The act, then, of 1843, has very properly repealed the 48th section of the 14th division of the Penal Code, and granted to the State and the prisoner the right to put the juror upon triors, and to prove him incompetent in the manner pointed out by law. These triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn, and then he and the two triors shall try the next; and when another is found indifferent, and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.—1 *Bl. Com.* 363.

This order, and this only, can be pursued. More than two triors, or more than two jurors, can in no case be sworn to try a challenge to a juror; but in the particular case already mentioned, one juror with two triors may be sworn for this purpose.

I have been particular in pointing out this proceeding, and have rather turned aside for that purpose inasmuch as it is likely to become very common in practice under the decision now made.

And may not a jury, thus empaneled, well be considered, what the law says they ought to be, *liberas et legales homines*? It is undoubtedly the high privilege of the accused to have their rights decided by twelve impartial men, who are free from the suspicion of partiality or prejudice. And the right of challenging every one on the list who does not come within that description, is a valuable privilege and ought to be strictly guarded. And better, after all, that ninety-nine guilty men should escape owing to the imperfection of this, like all other human systems, than that one innocent person should suffer for want of a fair trial, by an honest and unprejudiced jury. The law in its humanity presumes every man innocent until his guilt is proved. And should the public excitement against the defendant prevent a fair trial, it is good cause for continuing the cause. A legal quarantine is ordered until deliberation and tranquillity are restored. Ought not the jury, then, in every case, to come into the box with minds free from preconceived opinions, and ready to receive impressions from the evidence delivered in open court, under the sanction of an oath? While the Constitution of the State is binding on the conscience of courts, no juror can ever be forced upon the trial of a criminal, who is not perfectly indifferent, *omni exceptione major*.

The courts are not entirely agreed as to the mode in which the

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ination shall be conducted before the triors—whether by *extrinsic* evidence, or questions put to the juror himself, or *both*. It seems to be admitted on all hands, that a juror cannot be required to answer a question which would tend to his dishonor or discredit; but that when it does not, he may be interrogated on his *voire dire*: and further, that he may *voluntarily* answer any question, the privilege of objecting being personal to himself only. We leave here this point for the present, as it is not directly made by the bill of exceptions.

The conclusion, then, to which we have come is this—that upon the reason of the thing, upon the authority of adjudged cases in England and in this country, and the general understanding of the Bench and the Bar, that the law is not chargeable with the injustice of admitting a juror to sit on the trial who has formed and expressed a *decided* or *substantial* opinion on the merits of the case. And it is immaterial whether this opinion has been formed from having been an eye-witness of the *transaction*, or by having it proved by those who were; or from rumors, reports and newspaper publications, or in any other way. It is still evidence of partiality or prejudice operating on the mind: and upon admission or proof of the fact, before triors, it is cause of challenge, and they will so return. And the law *presumptively* attaches the disqualification to the fact of forming and expressing an opinion; and the burden is cast, then, upon the other party, of examining into the occasion, and weighing the evidence on which that opinion is founded, in order to restore the jurors in the judgment of the triors to *fairness* and *impartiality*.

We have been thus definite and specific, in laying down the rule, that our meaning may neither be misunderstood nor perverted.

Much ingenuity and legal learning has been displayed by the able counsel who argued in behalf of the State, in endeavoring to change the ancient principle of the law which attaches disqualification to the bare fact of having formed and expressed an opinion; and it is attempted to superadd or engraft upon it the further fact that the expression of opinion by the juror must have proceeded from grudge or ill-will to the accused. And Hawkins is cited in support of this doctrine. By reference to that author it will be found that he has been misapprehended. He says that “*it hath been allowed a good cause of challenge that a juror hath declared his opinion beforehand that the party is guilty, or will be hanged, or the like.*” And adds: “*Yet it hath been adjudged that if it shall appear that the juror made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge.*” (Book 2, ch. 43, sec. 28.)

Now, it will be clearly seen that Hawkins sanctions expressly, in the first paragraph quoted, the universally received doctrine as laid down in *Brooke's case*, (1 Salk. 153,) and ruled as law ever since, viz: that to entertain and express an opinion of the guilt of the accused, before trial, manifested a state of mind unsuited to allow a fair defence. But that if the person made such declaration upon his knowledge of the affair, or as it is more quaintly expressed elsewhere, because he knows the verity of the matter, and not out of ill-will, it is no cause of challenge: and for the obvious reason, that the latter declaration was of itself no disqualification by the ancient law. By the statute of 1843, the formation of an opinion from a knowledge of the fact, is made a principal cause of challenge; our

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Legislature rightly judging that the contrary doctrine was better adapted to the age of the 7th Henry, in which it originated, than the middle of the 19th century. It is well worthy of remark, however, that the act of 1843, framed professedly with a view to enlarge the grounds of competency by restricting the disqualification, *as to the court*, to a knowledge of the fact on the part of the juror has, in truth, curtailed the competency, if indeed this doctrine of the Year Books had not ceased already to be law.

In order to tranquilize, if possible, the feverish anxiety of the public mind as to the mode of selecting a criminal jury, to fortify and render stable the conclusion to which we have come, in this case, as well as to furnish beacons and landmarks to guide all who may be concerned in the administration of this branch of the law, I have availed myself of the brief time allowed to prepare this opinion to advert to a few leading adjudications upon the principles discussed. Coke says that the rule of law is, "that the juror must stand indifferent as he stands unsworn."—*Coke Lit.* 155, b.

Bacon, under the head of what partiality in the juror is a good cause of challenge, refers to the words of the writ of *venire* as the test of qualification. It requires such to be summoned "*per quos rei veritas melius sciri poterit, and qui nec the plaintiff, nec the defendant, aliqua affinitate attingunt*;" which words, he says, contain all causes of objection from partiality or incapacity, consanguinity and affinity; therefore if the juror be under the power of either party, as if counsel, servant of the robes or tenant, he is expressly within the intent of the writ; *so if he has declared his opinion touching the matter*.—3 *Bac. Abr.* Letter E. 5.

Reeves, in his history of the English Law, (1 vol. p. 329,) thus states the rule: "When the jurors appear, then the exceptions to them are to be taken. These were of various kinds. Any enmity against a party—any friendship with him, was a good exception. Being a servant, familiarity, consanguinity, affinity, unless the connexion was equally with both parties; being of the same table or family; under the power of a party so as to be benefited, owing suit or service; being counsel or advocate—all these and *many others* were good causes of exceptions to jurors. How particularly cautious is the law, as appears from the general principles laid down by these elementary writers, to see that the jurors in every respect be free from all impressions and influences: like Cæsar's wife, were even above suspicion.

Fries having been convicted of treason for levying war against the United States after a trial that lasted fifteen days, moved by his counsel for a new trial, on the grounds: 1st. That there had been a mistrial; and, 2d. That there had not been an *unbiased and impartial trial*. The facts on the second ground in support of the motion were, that Rhodes, one of the jurors, declared that he was not safe at home for those people, (meaning the insurgents.) That they ought all to be hung, and Fries particularly.

In answer to the second ground the attorneys, in behalf of the prosecution, contended that the declaration of the juror related to the general insurrection, and they were not applied to the particular issue he was sworn to try; *and they were not personally vindictive as to Fries*.

After a solemn consideration of the subject, IREDELL, *Justice*.

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livered his opinion in favor of a new trial, on the second ground of objection: that one of the jurors had made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, that manifested a bias or predetermination that ought never to be felt by a juror.—3 *Dallas Reports*, 518. How calm—how nobly firm! and that too when a stab was aimed at the very heart of the republic! when the column of liberty, so recently reared in this country, tottered to its base under the parricidal blows of these desperate men.

The trial of Col. Burr for treason in 1807, on account of the "celebrity of the party; the learned and profound doctrines which were so ably and elaborately discussed by such eminent counsel, and the great talents of the court," have given an importance and value to the doctrines there discussed and decided; surpassed certainly by none other in the history of celebrated state cases. And the very point involved in this opinion came directly under the consideration of the court.

Mr. MacRae, who was a counsel for the United States, insisted that to disqualify a jurymen, there must be *ill-will* to the party accused—a *personal prejudice* against him.

Mr. Wirt, who argued on the same side, seemed to think that the degree of impartiality required was unattainable, however right in the abstract. That it was a good rule for Utopia, or Araby the Happy, or as a standard of theoretic perfection. But on those who have human passions, it was in vain to expect it to operate. And that for jurors to come into the box without any impression; with minds as pure as the unsoiled snow on the virgin lap of Diana; such a jury could not be obtained unless it was to fall directly from heaven.

Mr. Hay, the district attorney, took broader ground, and maintained that that jury may be said to be impartial who entertain the common sentiments and feelings of a great majority of the people, and who are taken from the mass of the community; and that to say they were not, were to pronounce a libel on the State.

I will pass by the reply of Mr. Wickham, who, in answer to the argument of Mr. MacRae, urged that it was evidence of prejudice against a man, to believe and declare him guilty; and who contended that if the standard of competency, stated by Mr. Hay, was true, that is the common sentiments of the mass of the people, that the student might dismiss his black letter, in search of legal principles, and resort to barbecues, and other places of amusement, to learn the common sense of mankind.

Chief Justice Marshall, in delivering the opinion of the court, says: "The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by any undue bias of the mind.

"I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it. This is not to be expected—certainly the law does not expect it—where the jurors before they hear the testimony have *deliberately* formed and delivered an opinion,

that the person whom they are to try is guilty or innocent of the charge alleged against him.

"The jury should enter upon the trial with minds open to those impressions which the testimony of the law of the case ought to make ; not with those preconceived opinions which will resist those impressions.

"All the provisions of the law are calculated to obtain this end. Why is it that the most distant relative of a party cannot serve upon a jury ? Certainly, the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, the law suspects the relative of partiality—suspects his mind to be under a bias—which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury. To secure this end a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote ; the person may never have seen the party ; he may declare that he feels no prejudice in the case ; and yet the law cautiously incapacitates him from serving on the jury ; because it suspects prejudice—because, in general, persons in a similar situation would feel prejudice.

"It would be strange if the law were chargeable with the inconsistency of thus carefully protecting the end from being defeated by particular means, and leaving it to be defeated by other means. It would be strange if the law would be so solicitous to secure a fair trial, as to exclude a distant, unknown relative from the jury, and yet be totally regardless of those in whose minds feelings existed much more unfavorable to an impartial decision of the case.

"It is admitted that where there are strong personal prejudices, the person entertaining them is incapacitated as a juror ; but it is denied that fixed opinions respecting his guilt constitute a similar incapacity. Why do *personal prejudices* constitute a just cause of challenge ? Solely because the individual who is under their influence is presumed to have a bias on his mind, which will prevent an impartial decision of the case, according to the testimony. He may declare that, notwithstanding these prejudices, he is determined to listen to the evidence and be governed by it ; but the law will not trust him. Is there less reason to suspect him who has prejudged the case ? who has deliberately formed and delivered an opinion upon it ? Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion. It is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.

"It is for this reason that a juror who has once rendered a verdict in a case, or who has been sworn on a jury which has been divided, cannot again be sworn in the same case. He is not suspected of personal prejudices, but he has formed and delivered an opinion, and is therefore deemed unfit to be a juror in the case. Were it possible to obtain a jury without any prepossessions whatever, respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury ; but this is perhaps impossible, and, therefore, will not be required. The opinion which has been avowed by the court is : that light impressions.

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which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him. *Those who try the impartiality of a juror, ought to test him by this rule. They ought to hear the statements made by himself, or given by others, and conscientiously determine, according to their best judgment, whether, in general, men under such circumstances ought to be considered as capable of hearing fairly, and of deciding impartially upon the testimony which may be offered to them; or as possessing minds in a situation to struggle against the conviction which that testimony might be calculated to produce? The court has considered those who have deliberately formed and delivered an opinion, on the guilt of the prisoner, as not being in a state of mind fairly to weigh the testimony, and, therefore, as being disqualified to serve as jurors in the case.*

"The question must always depend on the nature and strength of the opinion."

I have extracted a large portion of this opinion. I am strongly tempted to insert the whole, hoping and believing that its tendency would be to arrest that spirit of innovation, which, in its zeal to punish and prevent crime, would insidiously undermine, or strike down with murderous hand, an institution, venerable alike for its antiquity and intrinsic worth. Courts and Legislatures would do well, before entering too rashly upon the work of reform, to pause and ponder seriously the sentiments of this pure and spotless man, and eminent jurist. As a patriot, he appreciated the blessings of the institutions which he fought to secure. He reflected deeply, as he states himself, upon the grave topics involved in the discussion, and the result is recorded in this opinion, with a perspicuity and force peculiar to the clear and discriminating mind of their distinguished author. The principles established by this decision may be rudely overthrown or disregarded: they never can be successfully answered.

It is true that our Constitution merely preserves the trial by jury, as heretofore used in this State, inviolate forever, and does not, in express terms, guaranty an impartial jury; yet, as it has been often ruled, *ex vi termini*, it is embraced in its spirit and provisions, as much as that the judges shall be impartial men. It would be thought, and deservedly, a monstrous outrage, for a judge to preside in a case, who was daily heard at every corner of the streets engaged in violent altercations to prove the guilt of his hapless victim. Can it be less so in the jury, who are made judges both of the law and the facts in the case?

In every State of the Union, so far as we are informed, the declaration of a settled opinion against a prisoner is deemed a good cause of challenge.

In *ex parte* Vermilyea, Judge Woodworth, before whom the cause was tried, says:

"All experience goes to prove the infirmity of human nature is such, that we cannot at pleasure get rid of preconceived opinions. The question is not how great is the bias, but does any exist? The least is sufficient."

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cient to exclude. Can the source from whence it is derived be material? As to the accused, it is the same thing whether the bias proceeds from a preconceived opinion, or malice and ill-will. *Why, then, superadd the necessity of proving malice or ill-will?* Without it, the parties do not contend on equal ground; by requiring it to be proved, in order to exclude the juror, it only shows the disparity to be greater."—6 *Cow. Rep.* 563-4, see above *John.* 316; 8 *John.* 445; 1 *Cow.* 432.

In *Rice vs. The State of Tennessee*, the Supreme Court say:

"The question touching the manner of testing the qualification of juries, is one of great importance. The right of trial by an impartial jury is guaranteed to every man. The mode of arriving at that degree of impartiality contemplated by the Constitution, should be fixed and uniform. Most persons who have witnessed the trial of an accused for crime, in counties of small population, can scarcely have failed to observe how few called as jurors stand indifferent towards the prisoner. If he be a stranger, or an obscure individual, the more certainly will that evidence of prejudice be exhibited. Men of wealth or of consequence in society when accused, though they may have to encounter the force of prejudice, nevertheless have their friends and adherents.

"From the bill of exceptions in the present case, we are to take it as proved, that the jurors, when called, declared on oath, that they had formed opinions touching the guilt or innocence of the prisoner; that they had expressed their opinions; and to the jurors thus impressed the question is severally put: Do you think, notwithstanding your opinion, you are in a condition to try this cause impartially?

"What is the condition of a juror when such a question is propounded? He will feel that it is an appeal made to his pride and magnanimity. He will naturally imagine he can—nay, he will suppose he has already divested himself of his prepossessions; and he will answer in the affirmative. But who that has taken the slightest view of human nature, can help seeing that immediately upon hearing a repetition of the same evidence which first raised his prepossessions, they will return upon him? Or, placing himself on his resolution, he will err on the other side, to reject the evidence, which, but for the appeal to his pride, would have had its due weight. Hence the wisdom of the rule that jurors should be *omni exceptione majores*. Prejudice or partiality operates as a disqualification to a person called as a juror. If he, on inquiry, discloses the fact when examined to the point, he ought not to be put to prisoner. It is unjust toward the accused, because he is sensible he has difficulty to encounter which the Constitution designed to guard him against; and it is unjust to the juror thus to force upon him the double duty of guarding against his formed partialities or prejudices, while he is charged, perhaps, with the life of the accused. The duty upon the juror is sufficiently weighty, when he comes into the box, to receive impressions from the evidence he may learn."

The next case to which I shall refer, is that of *Alexander Lithgow vs. The Commonwealth, Virginia Cases*, 397. And before proceeding to the examination of the main point decided by the General Court, I would observe that an incidental question arose, similar to that discussed by the Solicitor-General, Col. Ashurst. He contends, inasmuch as the record shows that a jury was selected, leaving the prison-

er's peremptory challenges unexhausted, that although he should be of the opinion that the court erred in putting Armstrong upon him, still, the judgment should not be reversed on that account. And authority may be found to that effect. We adopt, however, the view of the General Court of Virginia, expressed in Lithgow's case. Christopher Irvine, one of the *venire*, and the first on the panel, was, upon being called, challenged by the prisoner for cause, and his challenge being overruled, the prisoner, in order to exclude him, was put to his peremptory challenge.

"If," say the court, "it was error, under the circumstances stated, to overrule the challenge for cause, this court is of the opinion, that the subsequent exclusion of Irvine does not cure it, *although the record shows that the prisoner had not exhausted his peremptory challenges, even when a jury was finally obtained.* To procure the reversal of a judgment of conviction, for an error in point of law, it is not required to show that the prisoner was actually injured by it. It will be enough if the court can be satisfied that he might have been injured. But this court do perceive how this error might have operated to the prejudice of the accused. He might have thereby been prevented from exercising, to its utmost extent, his right of peremptory challenge, as a vain and useless thing. He might have thought it better, after that decision, to take the first jurors that offered, rather than excite suspicion against himself by challenging as many as the law allowed, when he had reason to believe that, after all, persons in the same situation as Irvine, would compose his triors; and he might have been thereby deterred, and probably was deterred, from making similar objections to others of the *venire*."

The case principally made by the bill of exceptions is then considered, and it was this: Irvine, the first juror on the panel, being sworn on his *voire dire*, said, in substance, that he had formed, and frequently expressed, a decided opinion of the prisoner's guilt; that if empaneled in this cause, he should certainly go into its trial with an opinion, generally, that the prisoner was guilty of the charges imputed to him; but he believed that he would be governed by the evidence, although he was unwilling to trust himself.

"Upon this case," say the court, "as we understand it, the prisoner's objection to Irvine, for cause, ought to have been sustained. He was not a proper juror, because he would have gone into the trial with a preconceived opinion and bias against the prisoner, formed, possibly, as well from the evidence he had heard, as from public rumor, and therefore could not be expected to deliberate and decide with that impartiality which is always expected in a jury."

Upon a careful examination of the English authorities, we do not find that any of them conflict with the opinion now delivered. The forming and expressing a deliberate opinion seems, on the contrary, to have been always allowed as a good cause of challenge, provided the fact was made to appear by evidence. This is sufficiently proved by Peter Cooke's case (13 State Trials) as well as other authorities, and is admitted by Hawkins, b. 2, c. 43, s. 28, in the passage cited by the Attorney-General. A qualification that "if the juror has made such declaration, from his knowledge of the cause and not out of ill-will to the party, it is no cause

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of challenge," "does not vary the case, nor prove that by the law of England, the expression of an unqualified opinion of another's guilt without a personal knowledge of it, is *not at least prima facie evidence of partiality*. Expressing the same opinion without personal knowledge, argues, to say the least of it, a readiness to believe unfavorably of the prisoner, which may afford good reason for presuming ill-will and prejudice."

The same point came under review again, in the case of *Hudson Spruce vs. the Commonwealth, Virginia Cases*, 375. This was a writ of Error to a judgment of the Superior Court of Law for Albemarle county, whereby the plaintiff in error was sentenced to be hanged for murder. From the bill of exceptions, it appeared that Abraham Wrant, when examined on his *voire dire*, stated that he had heard the subject of the trial frequently in the county; that he cannot now say whether the persons, from whom he has heard the relations of the evidence, were present at the examining court, or not. But upon such relations, which he believed to be true, he has formed a pretty substantial opinion, and expressed the same more than once; that he now thinks, notwithstanding the formation and expression of such opinion, he could, as a juror, do justice to the prisoner; that he was not at the examining court, nor had he heard the evidence in the case, nor conversed with any of the witnesses; that the opinion which he had taken up and frequently expressed, was founded in rumor in the county; that he felt no prejudice, and was open to conviction.

Upon this statement the judges were unanimously of the opinion, that the challenge to the juror *Wrant*, was good in law, and ought to have been sustained. They add:

"In England it has long been an established principle, that if a juror has formed and delivered an opinion, it is good cause for a principal challenge. And although a juror may believe, after an opinion so formed and expressed, he will be regulated by testimony; yet the law suspects him, and certainly not without reason. *There is nothing in the peremptory challenges of the prisoner not being exhausted by him.*"

It was assumed in the argument, that the courts of South Carolina had uniformly held a different doctrine from that now delivered by this court. There is certainly some misapprehension in this notion. On the contrary, it has nowhere been established upon a more solid basis. John E. Baldwin, tried and convicted, before Judge GRIMKE, in Charleston, moved for a new trial upon several grounds. The constitutional court were divided upon some of the points involved in the motion. Mr. Justice Bay thus expresses himself:

"Loose, random reports out of court, never can nor ought to be thought of sufficient consequence to merit a serious consideration in the sanctuary of justice. If, however, any man summoned as a juror, should be so lost to all sense of duty, as to form a hasty opinion upon vague and idle reports, and to express it, such man, upon due proof of such declarations, should be rejected as unworthy to sit upon a trial where the life of a man was concerned. Indeed, it appears to me that such conduct would not only be highly offensive in the eyes of God, but a high misdemeanor in law, for which he ought to be severely punished."—*S. C. Rep.* 321.

In the *State vs. Benton*, (*Dev. and Batt. Rep.* 208,) the defendant

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having been convicted capitally, moved a new trial on this ground, (among others therein set forth,) that the court erred in disallowing the prisoner's challenges for cause, to the jurors, who swore that they had formed and expressed an opinion relative to the prisoner's guilt or innocence. Judge GASTON, in delivering the opinion of the Supreme Court, thus expresses himself:

"The position, that a juryman may not be challenged, because of an opinion made up and declared on the very matter to be tried, unless such declaration can be referred to personal ill-will, seems to us not well founded. The indifferency required by the law, must be one of the judgment, as well as of the passions, such as enables the juror to find the facts truly according to the evidence; therefore, a mind not thus indifferent, but inclined against one or the other of the parties to the issue, whether from a personal dislike or a previous determination on the controversy, has to him an unfavorable disposition, or in the language of the olden times, an 'ill-will.'" Thus Breton, speaking of the prisoner being permitted to challenge a juror, because he was one of the indictors, gives as a reason, because "there was a presumption, that all who indicted him still bear the same *ill-will* against him."

"In the answer of Judge Chase to the articles of impeachment against him, he lays down as a rule, that the laws presume indifferency of every juryman, until the contrary appears; and that the presumption is not removed by general expression of opinion, as to the criminality of the act, of which the party is accused; but he distinctly admits, that this presumption is repelled by the declaration of an opinion that the party is guilty of the offence charged.

"From a decided opinion declared, the law infers a bias; and the belief of the person so biased, that he can rise superior to its influence, does not repel the legal inference, *nor ought it*; for it not unfrequently happens, that those who are most confident in the ability of their understanding to triumph over the obstacles in the way of its free exercise, and of the ascertainment of truth, owe this confidence to their ignorance and the stubbornness of prejudice, and may be the least qualified for the discharge of this, to all persons and at all times, perilous undertaking.

"The law excludes from the jury-box, as far as the infirmity of human nature, and the imperfections of human institutions will permit, any bias, partiality or prejudice which may prevent the verdict from being a finding of the truth, upon the proofs. It knows that honest, but weak men, may confidently believe, that they are governed by the evidence, when they are misled by their prepossessions; aware of the difficulty with which the understanding emancipates itself from the thralldom of opinions, once definitely formed and declared, it pronounces those unfit for the free examination of a controverted matter, who have thus prejudged it. But the law would do violence to the deductions which the observation and experience of every day furnish, if it held that any impression inducing assent for the moment, to the existence of a supposed fact, disqualified the understanding from entering upon a grave inquiry into the actual existence of a fact, with perfect freedom. Impressions short of full belief, opinions not definitely made up; or depending upon the supposition, that matters shall turn out as they have been represented—all of these may now impede the way of impartial deliberation, and furnish cause to suspect that the juror may lean more favorably to the one than the other."

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other party in the issue; and, therefore, *in all these cases, the law, by means of a challenge to the favorer, authorizes an inquiry, whether, in truth, they have produced this bias.*"

We deem it unnecessary to extend this investigation further. The foregoing momentous principles can never be successfully controverted. To overturn them, is to respect the deep foundations of criminal jurisprudence itself. It is to return to the rude and barbarous ages, when counsel was refused to a prisoner charged with a capital crime; when the privilege was denied him to prove his innocence by witnesses; and when he was pressed to death by heavy weights, for challenging, peremptorily, a greater number of jurors than he was lawfully entitled to. Such inhumanity is now deservedly repudiated by the civilized world. It has passed away with the fire and faggot, the thumb-screws, and the inquisition, and I sincerely trust, never to be re-established. Occasions might occur, as did in Britain, during the rebellion of 1715 and 1745, when, from the necessity of the case, their fundamental principles would have to be disregarded. In such an emergency, the maxim, "*salus populi suprema lex*," would be the law of the case. An alien is entitled to be tried by a jury *de medietate linguæ*, or composed one half of foreigners, provided that number can be found in the place. Still, if such a jury cannot be found, he must be tried. It would be a calumny upon the State, to say that she is incapable of affording her citizens a fair trial. At least, the present case presents no such necessity as would warrant the court in bending rules ordained by the most eminent judges, to shield the innocent and not, as it is supposed by many, the devices of crafty counsel, to defeat the administration of criminal justice. On the contrary, after the most deliberate consideration, to pronounce this objection insuperable; for, however unwilling we may be to see the guilty escape, we are still more so to establish a precedent, which would jeopardize the safety of the innocent.

No. 92.—WARREN J. BOON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

It is a good cause of challenge to the array in a criminal case, that the *tales jurors* presented on the panel and put upon the prisoner, were drawn from the Grand Jury box by the presiding Judge, and the list of the names so drawn, was furnished to the sheriff by the court, with instructions to summon them to serve as *tales jurors* on the trial.

The opinion which disqualifies a juror from sitting in a criminal case, depends upon its *nature* and *strength*, and not the source in which it originated.

This was an indictment for murder, tried in the Superior Court of the County of Greene, before Judge Merriwether, at the September adjourned Term, 1846.

For the history of the case and the errors assigned, see the opinion of the Supreme Court.

F. H. CONE, for the plaintiff in error, made the following points :

1st. That on the trial of criminal cases, it is the duty of the sheriff to summon the tales jurors from the by-standers or others, and the selection of the persons thus summoned belongs exclusively to the sheriff or his lawful deputies ; and that it is not lawful for the presiding judge on a criminal trial to draw the names of persons who are to serve as tales jurors on such trial, from the box containing the names of persons who are selected to serve as Grand Jurors—3 *Bacon's Abr.* 744 ; 3 *Blackstone's Com.* 355 ; 3 *Coke Litt.* 504, 524 ; 1 *Chit. Crim. Law*, 412, 421 ; *Hotchkiss Dig.* 222, 45, 628, 629, 702, 704 ; *Prin. Dig.* 429, 430.

2d. That where a person who is offered as a juror in a criminal trial, has answered the questions ordered to be propounded to him under the act of 1843 in the negative, so as to render him a competent juror, it is the right of the prisoner to put such juror on triors, and to prove by witnesses before the triors that such juror has formed and expressed an opinion as to the guilt or innocence of the prisoner, from *hearsay or report*, and to prove any other facts that may show that said juror does not stand indifferent between the prisoner and the State.—*Hotchkiss Dig.* 797-8 ; *Chit. Crim. Law*, 443, 447 ; 3 *Coke Litt.* 522 ; 3 *Bacon Abr.* 765, 766 ; 11 *Petersdorf*, 742 ; 40 *Law Lib.* 100-5-6-8 ; 6 *Eng. Com. Law*, 492 ; 1 *Johns. Rep.* 316 ; 3 *Stewart and Porter*, 308 ; 7 *Cowen R.* 121, 122 ; 4 *Wendell*, 229 ; 21 *ib.* 509.

J. M. ASHURST, Solicitor-General, for the State.

1st. No threat will justify a killing.—*Prince*, 642.

2d. In a criminal cause, there being a deficiency of jurors from challenge or otherwise, the court may order the sheriff or his deputy to summon by-standers or others.—*Prince*, 430.

3d. Who are competent jurors to try criminal causes under our law ?—*Prince*, 430.

4th. At common law, independently of our statute, it would not have been a good ground of challenge to the array, that they were taken from the intelligence of the county.—4 *Barn. and Ald.* 491.

5th. A juror who answers both questions under the act of 1843, so as to make him competent, cannot be rendered incompetent before triors, by proof of an expression of opinion from rumor or hearsay merely ; but it must be shown also that such expression arises from *ill-will or individual prejudice*.—*Stephen's Crim. Law*, 300 ; *Joy on Con., &c.* 189 *et seq.* ; 4 *Barn. and Ald.* 502.

Suppose the court in this case had awarded triors, and the proof submitted to them that a mere expression of opinion as to the guilt or innocence of the prisoner, had been made from rumor or otherwise, and the court below had charged the triors, that this of itself, unless done with a malicious intent, would not render the juror incompetent, would this court decide that error had been committed ?

By the decision of the court in *Robinson's case*, a juror answering negatively to the questions propounded under the act of 1843 was *prima facie* a competent juror. How is he rendered incompetent ? By the rules of the common law only.

6th. The sixth article of the amendments to the Constitution of the United States, has reference alone to the trial of officers against the laws of the United States.—3 *Story on Constitution*, 652-6.

The Constitution of Georgia prescribes the fundamental law, and fixes the right of trial by jury of offenders against her own laws. And the Legislature has a right to prescribe any law, not inconsistent with the State Constitution, for the trial and punishment of offenders against the State laws.—*Prince Dig.* 91-2.

By the Court—LUMPKIN, Judge.

was a writ of error, to a judgment of the Superior Court of Greene.
The plaintiff in error was indicted for murder, convicted and

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sentenced to be hanged. There are several objections raised to the record and proceedings in the case.

It appears that when the prisoner was put on his trial and the jury about to be sworn, the defendant challenged the array, because the same was not arrayed by the sheriff or his lawful deputy—so far as related to the *tales* jurors presented on said panel; but that said *tales* jurors, to wit the eighteen last named in the array, were not summoned from the by-standers or others according to law; but that the names of the *tales* jurors were drawn from the grand jury box by the presiding judge; and the list so drawn was furnished to the sheriff, by the court, with instructions to summon them to serve in the case: and the persons so drawn were those presented as *tales* jurors in said array. Whereupon the defendant prayed that the array might be quashed, which motion being overruled the prisoner by his counsel excepted.

In the further progress of the case, Adam G. Scott was presented and put upon the prisoner as a juror; and the counsel for the prisoner, for the purpose of ascertaining his competency, proposed to ask him, under the act of 1833, "whether he had formed and expressed an opinion in regard to the guilt or innocence of the prisoner at the bar." The court would not suffer this to be done, holding that the only questions which could be put to the juror on his *voire dire*, by the court, were those prescribed by the act of 1843, namely: "Have you, from having seen the crime committed or having heard any part of the evidence delivered on oath, formed and expressed an opinion in regard to the guilt or innocence of the prisoner at the bar?" "Have you any bias or prejudice resting on your mind for or against the prisoner at the bar?" To which opinion of the court defendant's counsel excepted.

John Branch was then offered and put upon the prisoner as a juror; and the two interrogatories prescribed by the act of 1843 having been successively propounded to him on his *voire dire* and answered in the negative, the prisoner moved to put him on triors, in order to prove by witnesses, before them, that the juror had formed and expressed an opinion, as to the guilt or innocence of the prisoner at the bar, from hearsay or report. The court refused to allow this, whereupon the accused, by his counsel excepted.

Defendant's counsel, in the course of the case, inquired of a witness, John C. Durham, whether the deceased had not made threats against the prisoner, which were communicated to him before the homicide was committed. The court ruled out the evidence as inadmissible to justify the killing. Whereupon counsel for defendant excepted.

The *second* and *fourth* grounds of error, have been abandoned by the counsel for the accused. On the *third*, to wit, the refusal of the Circuit Judge to permit John Branch to be put upon triors, for the purpose of ascertaining his competency, this court would be compelled to award a new trial in accordance with the opinion, just delivered in the case of *Kinchen P. Boon vs. the State*.

- Before, however, dismissing this branch of the exceptions, I would remark, that a juror's competency should, in every case, be tested by the *strength* of his conviction and not by the *nature* or *degree* of testimony which produce it.

Chief Justice Spencer, on the trial of Van Alstyne, for the murder

Huddlestone, stated the principle adopted by him to be this: "If a person had formed or expressed an opinion for or against the prisoner, on a knowledge of any of the facts attending the murder, or *from information of those acquainted with the facts*, he considered it good cause of challenge; but if the opinion of jurors were founded on mere rumor or report, he decided that such opinion did not disqualify the jurors."

Now, this rule which certainly has the recommendation of being clear and explicit, has been *nominally* followed by the courts of several of the States, and that of our southern sister Alabama among the rest. Indeed, the Legislature of this State has made it a matter of express statutory regulation. And yet the Supreme Court of Alabama, in the trial of Coleman Williams, in its comments upon Pollard's case, decided by the General Court of Virginia, have shown conclusively, how unsafe and unsatisfactory a criterion of impartiality is the arbitrary standard set up by Judge Spencer, as every other will be in practice not founded in the reason of things. This is not a place for the bed of Procrustes, but for a rule flexible and malleable, and which can be moulded, in the minds of the triors, to adapt itself to the ever-varying circumstances of each individual's opinion. John H. Parker was held to be an impartial juror, by the General Court of Virginia, *notwithstanding he had formed, and thought he had expressed, an opinion unfavorable to the prisoner, from having heard one of the witnesses testify.*

The Supreme Court of Alabama justify this decision although in the very teeth of the principles asserted by the Chief Justice of New-York. Says Judge Taylor: "It does not appear what kind of testimony the juror heard; it may have been altogether circumstantial; and although it was sufficient to impress him with the idea, that the accused was guilty, it is true, yet that impression must have been quite unsettled, which was evinced by the slight recollection he had with regard to it; and, we must suppose, had not made any such impression on his mind as closed it against the full effect of the testimony which might be offered on the trial."

So much for Chief Justice Spencer's rule, which excludes a juror whose opinion is formed "from the information of those acquainted with the facts," and the commentary of the court *professedly adopting it!* The judgment of the Virginia court justified and approved the rule, which pronounces a juror indifferent between the prisoner and the State, although he has formed, and, he thinks it probable, has expressed, an opinion, that the defendant was guilty, *from having heard a part of the testimony, on oath, in open court!*

The other branch of the proposition stated by the Chief Justice, will be demonstrated, in practice, to be equally defective and untenable.

The most inveterate impressions, such, even, as will not yield to "confirmation strong as *proof from Holy Writ*," are not unfrequently created by rumor; and if an opinion be thus firmly riveted in a mind so weak or wicked that it will not yield to the force of testimony, even though the juror is under the solemn sanction of an oath to give his verdict according to the evidence, ought not such an opinion to operate as an exclusion, notwithstanding it be founded on report, or anything else?

We return, then, with abiding confidence in the simplicity and soundness of the principle established by this court; namely, that it is the *weight* of the opinion which the juror has imbibed, which must decide

competency, regardless of the source in which it originated. A rule which should commend itself to all, securing, as it infallibly must, a trial, in all cases, in the county in which the offence was perpetrated; and by a jury, either selected by the prisoner himself, or by those, as *trials*, whom he has accepted to pass upon the merits of the indictment.

Forced, as we are, to reverse the judgment below, on this ground, we shall consume but little time in disposing of the *first* objection, to wit, the challenge to the array, because the *tales* jurors were drawn by the court from the grand jury box, and the list furnished to the sheriff, to be by him summoned to constitute the jury.

We are not prepared to say, that a *grand juror* is *disqualified*, as such, from serving on the trial of a criminal case. Such a decision was once made by a distinguished judge of this State, and I may add, not without reason. It is the duty of the grand jury to accuse the defendant; of the petit jurors to try him. When, from challenge or otherwise, there shall not be a sufficient number of jurors to determine causes, it is made the duty of the sheriff to summon by-standers, or others, qualified as required by law, to complete the panel. What is meant by this? *Talesmen*, to fill up the grand jury list, are to be summoned from that class who belong to the grand jury list. Is not the reverse of this equally true, that when a full panel is needed to try criminals, *talesmen* are supplied from the petit jury list? Can any others be rightfully denominated *talesmen*, to make up a full panel by additions to the twenty-four or twelve, as the case may be, already in attendance? Are grand jury men *such like men* as these?

Scrutinize carefully the act of 1805, and see the distinction obviously made between *grand jurors* and those for the trial of civil and criminal causes, or *petit jurors*! Reflect, too, upon the directions given by our law for the selection and drawing of grand juries, and does not the conviction fasten itself on the mind, that the sealed box containing their names, is only to be opened, from term to term, for the *sole* purpose of drawing a *grand jury proper*, and that it is an unauthorized innovation of the sanctity of that seal, to break it for any other purpose?

By the 38th section of the judiciary act of 1799, "all free male white citizens, above the age of twenty-one, and under sixty years, are declared to be qualified as *petit jurors*, for the trial of all *civil* causes; but for the trial of treason, felony, breach of the peace, or any other crime, or of any title to real estate, *they* (that is the *petit jurors* mentioned in the previous part of the section) must be qualified to vote at elections for members of the Legislature. This provision, unquestionably, does not apply to the grand jury. In strictness, then, whence the right of grand jurors to sit on the trial of criminal cases? They have not been detailed specifically for this duty, and if it be claimed for them, as being by-standers and others, *tales de circumstantibus*, under the 44th section of the judiciary, then, by parity of construction, *petit jurors* would be entitled to be summoned, as *talesmen*, to complete the grand inquest, in case a sufficient number should not appear to be sworn. Still, the courts, perhaps, would not feel warranted in rejecting from the jury any citizen, otherwise competent, who was within the lawful age, had paid all taxes, &c.

There are other and better reasons for discouraging this practice

The law devolves the duty of summoning the jury upon the sheriff or his deputy; and if they are disqualified, then upon the coroner, or such other disinterested person as the court may appoint. The ministerial officer acts upon his official responsibility, and for any misconduct, the party aggrieved has his redress.

We are aware that courts, in their praiseworthy enthusiasm to suppress crime, have, in some instances, even dictated to the sheriff, from the bench, the individuals to be summoned. We cannot express too strongly our repugnance to these innovations as to the mode of trying offences. They are subversive of the great principles of the common law—principles, too, founded in a deep regard to the life and liberty of the citizen; and I shall be pardoned, I trust, for suggesting, just here, that memorable saying of Sir Michael Foster: "Judges are ministers appointed by the crown, for the ends of public justice, and should have written on their hearts the solemn engagement his majesty is under, 'to cause law and justice in mercy to be executed in all his judgments.'" —*Foster*, 263.

For the purpose of showing with what jealousy courts watch every departure from the mode prescribed by law, in selecting a criminal jury, I would refer to *Gibson vs. The Commonwealth*, Va. Cases, 111; *Gardner vs. Turner*, 9 John Rep. 260; *Eaton vs. The Commonwealth*, 6 Biss. Rep. 447; *Mitchell vs. Likins*, 3 Blackf. Rep. 258.

But there is a stronger reason still, for arresting this proceeding. Are none but *grand jurors* the *peers* of the *prisoner*? Are *they*, on the contrary, his *fellows* in sympathy, or anything else? Was it ever known—was it ever heard of—that *peers*, in England, were tried by yeomen, or yeomen by peers? Will it be replied, that our law recognizes no distinction in classes in this happy country? Still, is there none, in fact; in sentiment, habits, and everything else, which makes one man to differ from another? *Does not the law itself discriminate*? Does every citizen, even all those who vote for members of the Legislature, serve as grand jurors? Or is not this privilege limited to a few "fit and proper persons," to be selected by the justices of the Inferior Court, together with the clerk and sheriff of the county? The statute, then, itself makes a difference. Is it not constantly observed in practice? On the trial of overseers for the killing of slaves, are overseers or employers elected to sit on the jury?

It is needless to disguise it, that man only is the equal of the other, who, in the legal as well as the common-sense acceptance of that term, from situation, condition in life, education, morals, employment and other circumstances, thinks as he thinks and feels as he feels.

What chance had a "*Jew dog*" in a Christian court, formerly, in Britain, and even now, in many parts of the Continent? The prejudices of *caste*, which so warp the understanding, may not operate as strong here as elsewhere; still they exist and vitally affect the conduct of men, often, perhaps, unconsciously to themselves.

Believing, therefore, as we do, that the practice under investigation is manifestly at war with the spirit, at least, of the great right granted to all, of being tried by their *peers*, we cannot give it our sanction.

judgment reversed.



No. 93.—WILLIAM J. BELL *et al.*, plaintiffs in error, vs. ELIZA BELL, by her next friend, ELIZABETH BUGG, defendant in error.

At common law, marriage amounts to an absolute gift to the husband of all the personal estate of the wife, of which she is at the time actually possessed, in her own right.

In her choses in action he acquires only a qualified property, which may be made absolute by a reduction into possession during his life.

The wife is entitled in equity to a suitable provision for herself and her children, out of her fortune, whenever it is within reach of a court of chancery, and not reduced into possession by the husband; and this right extends both to legal and equitable choses in action.

Whether the children have a distinct substantive right to a provision out of her choses in action. *Quere?*

The wife may file her bill by her next friend, to assert her equity.

The wife's equity is good against her husband's assignees in bankruptcy or insolvency, his assignees to pay his debts generally, and also against a special assignee, or purchaser for value.

A division of an estate under our statute, at the instance of the administrator, *setting apart* one share to the husband in right of his wife, and leaving it in the possession of the administrator, (neither the husband nor wife being present, nor represented, and no refunding bond being given,) is not such a reduction into possession as will defeat the wife's equity.

This was a bill in equity, filed by Eliza Bell, a *feme covert*, by her next friend against her husband, William Jewell, the administrator on the estate of her deceased father, and sundry judgment creditors, praying for an injunction, and decree for what is commonly called the wife's equity, to be set apart in the name of a trustee for the special use of herself and her children. The bill stated that the complainant was one of five distributees of the estate of her deceased father, William Bugg, who died in 1845, possessed of considerable property, consisting of lands and slaves, &c. That said William Jewell administered on his estate. That on the application of the administrator, the Court of Ordinary, in December, 1845, appointed certain persons as commissioners to divide the slaves. That on the 10th day of December following, the commissioners thus appointed divided the slaves into five portions, and that four of the slaves were apportioned to her husband in her right. That neither the complainant nor her husband was a party to the proceedings for a division, nor had notice of the application therefor, nor was either of them present at the division. That the slaves thus allotted and set apart never went out of the possession of the administrator, Jewell, and no person was present on the part of her husband to receive them, and the administrator continued to retain control over them. That they had never been in the possession of her husband, but had remained with the administrator until they were seized by the sheriff as the property of her husband by virtue of an execution at the

instance of Thomas E. Zuber, one of the defendants to said bill. That the levy was made on the 15th of December, while said slaves were in the possession and under the control of the administrator. That said slaves were sold in February, 1846, by the sheriff, under an agreement that the proceeds of the sale should be held by the sheriff, subject to the decision of the court on the facts of the case, in the same manner, and with the same benefit to her, as on an application by bill on her part to stay the sale, and to seek the aid of a court of equity in her behalf to have the property set apart for her exclusive benefit, so that the creditors of her husband should not subject the same to the satisfaction of their demands against him. And finally, that her husband was hopelessly insolvent, and unable to maintain her and her children.

This bill was returned to October Term, 1846, of Oglethorpe Superior Court, when the solioitors for the defendants below, demurred thereto on the following grounds:

1st. That so far as respected the money in the hands of the sheriff, or the slaves out of which the same was raised, the wife could have no equity to a settlement out of the same, as, by the allegations in her bill, the said creditor-defendants were calling upon neither a court of law nor equity to assist them in prosecuting their rights, but were merely executing judgments of the court already obtained.

2d. Because the creditors could levy, and did levy only upon the legal interest of the husband, William J. Bell, their debtor, and could sell and did sell nothing more. If the slaves were not his, the purchaser received no good title.

3d. That if the slaves were not the subject of levy and sale, a full common-law remedy was afforded in a claim by the administrator, Jewell. If he failed to claim, and thereby the rights and interests of the complainant were affected, her redress was upon him, and not upon the creditors, in whose conduct there was nothing charged illegal, unconscientious, or inequitable.

4th. Because the creditors were not attempting to make any equitable interest of the wife subject to their debts, and consequently the rule of doing equity, when they sought equity, did not apply.

5th. Because the exhibit of the return of the commissioners attached to complainant's bill showed that the slaves levied on had been set apart as the portion of William J. Bell, and the only reason why they had not been delivered, was because he was not present. If the order of division and return of the commissioners were illegally obtained, the complainant's remedy was upon the administrator.

6th and lastly. Because the marital rights of the husband had attached, and consequently the judgment creditors had a right to sell.

After argument upon the demurrer, the court below, Judge Sayre presiding, overruled the same, and ordered the defendants to answer. To which decision the counsel for the plaintiffs in error excepted.

1st. That the court erred in deciding that a court of equity would interfere, and enjoin a judgment creditor from selling property layied on as the property of the husband, until provision was made for the support of the wife.

2d. That the court erred in deciding that the marital rights of the

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husband had not attached to the slaves set apart as his portion of the estate.

3d. That the court erred in deciding that the complainant could seek the benefit of the division made by the commissioners, and at the same time deny the benefit of it to the judgment creditors as being irregular and illegal.

4th. That the court erred in deciding that the marital rights did not attach till the indemnifying bond was given.

5th. That the court erred in deciding that the return of the commissioners of the division, and the order making the return the judgment of the Court of Ordinary, were not sufficient to make the husband's marital rights attach.

6th. That the court erred in overruling the demurrer.

THOMAS R. R. COBB, for the plaintiffs in error, insisted :

1st. That equity will not enjoin a *fi. fa.* against the husband from selling property levied on as his, for the purpose of making a settlement on the wife.—*Murray vs. Lord Ellibank*, 10 Ves. 88 ; 5 Cow. 590 ; 2 McCord, 36 ; 2 John. C. R. 206.

2d. That the partition and return of the partitioners, made the judgment of the Court of Ordinary, setting aside specific negroes to Bell in right of his wife, vested the marital rights of Bell.—*Davis vs. Rhame*, 1 McCord, 191 ; *Sansey vs. Gardner*, 1 Hill, 191 ; *Spear's Eq. Rep.* 150 ; 1 Hill So. Ca. Chan. 397 ; *Richardson's Eq.* 6 ; 2 Gill and John. 81 ; 3 Bro. Ch. 362 ; 2 Conn. Rep. 564 ; 1 Dev. 456 ; 4 ib. 512.

3d. That the judgment upon the partition cannot be attacked in this way for any irregularity, no fraud being charged and no prayer to set aside the judgment, or to arrest the proceedings until the judgment could be reversed in the Court of Ordinary.—*Cole et al. vs. Hall*, 2 Hill N. Y. Rep. 625 ; 1 Dev. 456 ; 3 J. C. Rep. 281 ; 4 ib. 85 ; 14 Ohio Rep. 238.

4th. That Eliza Bell, the wife, claiming the benefit of the partition, is estopped from denying the benefit of it to the creditors.

WILLIAM S. ROCKWELL and BENJAMIN F. HARDEMAN, for the defendant in error.

LUMPKIN, Judge, having been originally of counsel, gave no opinion.

By the Court—NISBET, Judge.

The case made in this record involves the doctrine of what is called, in the books, the wife's equity.

The cases in relation to this subject are exceedingly numerous.

The precise extent to which the doctrine of the wife's right in equity to a settlement out of her equitable and legal choses in action goes, we are free to admit, is not satisfactorily settled. Yet we do not hesitate to say, that the right itself is as clearly and as permanently established, both by authority and upon principle, as any known to the equity jurisprudence of England or America. It is difficult to trace its origin and to ascertain the grounds upon which it was at first established.

It owes its birth to the parental interposition of a court of equity, to provide, out of property accruing to a wife, for her support and that of her children, when they have no other sources of maintenance ; ags

the desertion, neglect or insolvency of the husband and father. It is the creature, therefore, of a court of equity, and stands upon its own peculiar doctrines; and, according to Mr. Story, we must look to the practice of that court for its proper foundation and extent. The decisions in chancery have engrafted it upon the law of the land. And in this instance, equity has relaxed, as we think most wisely and beneficially, the stern and cruel rigidity of the common law; many of whose technical iniquities are yielding to the broader light and more exalted virtue of this age. That its farther extent should be carefully guarded is true; but in our judgment as now understood and recorded, it is based on reason and is commended by its conformity to the precepts of enlightened humanity. It may not be inconsistent with the severity of a judicial opinion to say, that these equitable rights of women are, in no small degree, to be attributed to that higher estimate of the sex, which has resulted from the extension of education and Christianity. Chancery, standing in *loco parentis*, ought to do what the father himself would do were he in life.

He unquestionably would not apply his earnings to the payment of debts contracted by a son-in-law, (and not contracted upon the credit of such earnings in his possession,) or to minister to his extravagance and dissipation, until he had first provided for his daughter and her children. Equity, occupying his place, will do what she is instructed by reason and humanity he would do. Natural justice asserts the right of a suffering child to her patrimony, as against the right of strangers to her blood; or even of her own husband, when he is, whether by vice or misfortune, incapable of providing for her. And without refining upon this subject, it is not difficult to believe, that, after all, it is upon natural justice that the whole doctrine is based.

At common law, marriage amounts to an absolute gift to the husband of all the goods, personal chattels and personal estate, of which the wife is actually or beneficially possessed at that time in her own right. All these he acquires an absolute property in and dominion over, by the marital right. He does not require the aid of a court of law or equity to establish his claim to her property in possession; he takes it free from any right of survivorship; he may dispose of it during life or bequeath it at his death, and if he does not will it away, it goes to his personal representatives by the law of descent.—*Clancy's Husband and Wife*, 1 to 3; 1 *Coke Litt.* 351 b; *Story's Equity*, sec. 1402; 1 *Roper*, 169. But to her choses in action, such as debts due by obligation, or by contract or otherwise, the husband is not absolutely entitled, unless they are reduced into possession during the coverture.—*Coke Litt.* 351, a; 2 *Roper on Husband and Wife*, 204, 205; *Clancy*, 3 to 9. In these the husband acquires a qualified property, which may be asserted by action at law, and if not reduced into possession during his life, they survive to his wife, and at her death descend to her representatives.

Such are the rules of the common law, according to which the wife has no right and no process by which to set up right to a provision out of her choses in action, equitable or legal. In the language of Bracton: "*Omnia, quæ sunt uxoris, sunt ipsius viri, non habet potestatem sui, sed*" It is at this point of common-law inability, that equity comes to relief, and laying its hand upon her choses in action—her fortune,

wherever and whenever within its reach—arrests the process of appropriation, on the part of the husband and those who claim under him, and applies them to her use. This equitable right is considered by some of the authorities as personal to her, and attaches in favor of her children only in cases where she files a bill for a settlement. In such a case, the court will carry out the supposed desire of the wife, in providing for her children, unless she dissents. Of this opinion seems to be Mr. Justice Story.—*Story's Equity*, sec. 1417; 11 *Bligh R.* 104-5-6.

If, however, the wife should die, pending the proceedings, without waiving a settlement, the children may, by a supplemental bill, enforce their claim.—*Clancy*, 527-8; 2 *Dick*. 604; 10 *Vesey*, 89; 13 *Vesey*, 1, 8, 9; 6 *Sim. R.* 576, 584.

It has been claimed, notwithstanding, that where the mother dies without having obtained a settlement, or a decree for one, the children have an original substantive right to a provision.—See *Atherly on Marriage Settlements*, 355, 356; 13 *Vesey*, 7; 2 *Atk.* 180; 1 *Dick*. 391; . The contrary of this seems to be the better opinion.

In all cases where the husband comes into a court of chancery, asking its aid to acquire the possession of his wife's property, whether it exists in the form of an equitable or legal chose in action, that court having acquired the power to act upon the subject matter, will use it to do equity to both parties. As he seeks equity, it will hold him to do equity before it will grant it, and upon this principle he is, in such cases, required to make a suitable provision for her and her children.—*Story Equity*, sec. 1408; 2 *Atk.* 419, 420; 2 *Vesey*, 561; 1 *Vesey*, 538, 539; 1 *Peere Williams*, 459; 2 *Johns. Ch. Reps.* 206, 208; 1 *Paige R.* 166; 2 *Paige*, 308; *Clancy on Marr. Women*, 456 to 475.

It is of no consequence in such a case, says Story, "whether the fortune accrues before or during the marriage; whether the property consists of funds in the possession of trustees or of third persons—or whether it is in the possession of the court, or under its administration, or not; for under all these circumstances the equity of the wife will equally attach to it."—*Story's Equity*, sec. 1408; 2 *Roper*, 259.

It will not only be enforced in cases where the husband goes into a court of equity to acquire possession of her fortune as stated above; but it will be enforced where she or her trustee brings a suit in equity for the purpose of asserting it. This position has been controverted, and for the reason that the husband is not asking equity, and therefore the jurisdiction of chancery does not attach; and the reason of the law ceasing, the law itself ceases. But it is now beyond controversy established, that whenever the wife is entitled to this equity, she may assert it as plaintiff, by bringing a bill by her next friend.—*Clancy on Marr. Women*, 471 to 475; 1 *Roper*, 260, 263; 5 *Vesey*, 737; 1 *Strange*, 503; 1 *Stra.* 238; 2 *Cox R.* 422; 10 *Vesey*, 574; 6 *Paige*, 366.

Chancery will lay hold of the property of the wife as far as may be within its power, for the purpose of providing a maintenance for her.

It has been made a question whether the wife's equity attaches upon her legal choses in action, and this is one of the points made in this case—the property out of which the wife here seeks her equity, is her distributive share of her deceased father's estate. It is urged by cer

for the plaintiff in error, that this is not an equitable but a legal interest, and therefore the equity of the wife does not attach upon it. Waiving for the present the question, whether her distributive share be or be not an equitable or legal interest, we say, that if it be the latter, the wife's equity will attach upon it in all cases where the husband, or those who claim under him, from any cause whatever, goes into a court of equity to reduce it into possession.

We are aware that such a case is not made by this record—for there was no suit in equity by the husband, or others claiming under him, for this property; but we find it expedient, notwithstanding, to state the principle as above.

Farther—the English rule in equity is, that where there is a suit in the Ecclesiastical courts for subtraction of a legacy, and there is a married woman to be protected, or a trust to be executed, the court will restrain the suit by injunction.—1 *Atk. R.* 491; 1 *Hagg. Eccl. Reps.* 535.

Chancery will restrain a suit in the ecclesiastical courts, by the husband, for the wife's legacy, until provision is made for her.—2 *Kent*, 140; 2 *Atk. Reps.* 419; 1 *Strange*, 238. Chancellor Kent does not in terms say, but he clearly intimates his opinion, that chancery may, on just principles, restrain the husband from availing himself of any means, “either at law or equity,” of possessing himself of his wife's personal property in action, unless he make a competent provision for her.

In the State of New York it is settled that equity will, on a bill filed by the wife, restrain the husband or his assignees from possessing themselves of her property at law, until provision is made for her.—*Van Epps vs. Van Deusen*, 4 *Paige*, 64; *Fry vs. Fry*, 7 *Paige*, 462; 1 *Hoffman's Ch. R.* 462.

But we do not concede that a distributive share of an estate is in character of a legal chose. Executors and administrators are treated as trustees of the fund committed to their charge, and in that character are subject to the jurisdiction of a court of equity; and, therefore, an unpaid legacy, or a distributive share of an estate, is an equitable interest. Certainly the wife, under coverture, has no right of suit at law for it. She must needs go into a court of equity to secure her settlement. The interest is of equitable cognizance—it is within reach of a court of equity. The right to her equity, in this case, therefore, so far as the character of the property is concerned, does not admit of doubt.

In accordance with these views, it has been held in England that a wife need not wait until suit is brought by her husband, in the Spiritual Court, for a legacy or share in an intestate's estate. She may file at once a bill against him or his assignees for a settlement out of the legacy or share.—*Atherly*, 351; *Clancy*, 443; 5 *Vesey*, 537; 10 *Vesey*, 578.

The assignees in bankruptcy or insolvency of the husband, also his assignees for the payment of his debts generally, and the special assignee, or purchaser from him for a valuable consideration, are bound, to make a settlement upon the wife out of her choses in action or equitable interests assigned to them, in the same way and to the same extent as

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under the same circumstances as the husband himself would be bound to make one—for it is a general principle that they take the property subject to all the equities which exist between the husband and wife.—1 *Roper*, 268; *Clancy on Marr. Women*, 476 to 493; 1 *Mad. Ch. Pr.* 385, 386; 2 *Atk.* 420; 1 *Peere Will.* 382; 1 *ib.* 458; *Newland on Contr.* 122 to 129; 2 *Vesey, Jr.* 601; 4 *Bro. Ch. Reps.* 139; 2 *Vesey, Jr.* 680; 9 *ib.* 87; 1 *Paige*, 620; 2 *ib.* 303; 4 *ib.* 64; 2 *Kent*, 139; 2 *Johns. Ch. R.* 206; 4 *Gill and Johns.* 282; 7 *Dana Reps.* 106; *Hill's (S. C.) Ch. Reps.* 509.

If the wife is already amply provided for under a prior settlement, equity will not interfere, for one of the grounds upon which her equity rests, is the destitution of her circumstances. Settlement before marriage, the intended wife being of age, declared to be in consideration of her present estate, as well as all that which may accrue to her after marriage, will bar her equity; for the husband, in that case, stands in the light of a purchaser of all her choses in action.—*Clancy Marr. Women*, 512; 2 *Vesey, Sen'r.* 677; 9 *Vesey*, 96; *Atherly*, 358. And if an adequate settlement is made upon the wife after marriage, in consideration of her equitable property, it will exclude her from farther provision. But in this case the court will inquire into the adequacy of the settlement, and if inadequate, a farther provision will be awarded her.—*Clancy*, 510, 520; *Atherly*, 359.

It seems, too, that a wife may waive her equity in some cases in open court, although Lord Hardwick, in one instance, refused to permit it to be done.—*Clancy*, 510, 515; 2 *Vesey, Sen'r.* 579.

Thus have I stated what appears to me to be the principal rules which constitute the doctrine of the wife's equity. They run out into various details which I do not propose to trace. It remains to apply them with greater particularity to the case in hand. To do so, it is necessary to recapitulate the facts; premising that the able counsel who argued this cause for the plaintiff in error, does not deny the general doctrine on this subject, but denies its applicability to the facts disclosed in this record.

The father of Mrs. Bell died intestate, leaving an estate in negroes and other property, in which she was interested as distributee. Administration was taken upon his estate. William Jewell, the administrator, applied to the Court of Ordinary of Oglethorpe county, at an adjourned session, for the appointment of commissioners, under our statute, to divide the negroes belonging to the estate, and they were accordingly appointed. Of this application, it does not appear, from the record, that either Mrs. Bell or her husband had notice. The commissioners divided the negroes into as many portions as there were distributees, *setting apart*, to use their own language, one of them to William J. Bell, in right of his wife Eliza. Neither Bell nor his wife were present at the division, and the return of the commissioners declares that they, not being present or represented, their share was left in the hands of the administrator. The return was recorded on the books of the Court of Ordinary. No order was passed, making it the judgment of the Court of Ordinary, and no refunding bond was given.

The property was at no time out of the possession of the administrator, but continued in his possession until it was levied upon, in his

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as the property of W. J. Bell, and taken possession of by the sheriff. To avoid the expense of keeping the negroes until they could be brought to sale, after tedious litigation it was agreed, in writing, between Mrs. Bell and the creditors of her husband, that they should be sold at once, and that the money should remain in the hands of the sheriff, subject to the same rights which she might have on the property if not sold. Mrs. Bell, then, by her next friend, filed her bill, charging all these facts, and also that her husband was wholly insolvent, and that herself and children were without the means of support—asking an injunction against the creditors, and praying that so much of the money in the hands of the sheriff, and of the remainder of her interest in her father's estate, as might be necessary, be set apart, in the hands of trustees, for the special use of the complainant and her children.

The defendants demurred to the bill upon several grounds, all of which were overruled by the presiding judge. The questions made occurring on demurrer, all the statements in the bill are admitted to be true.

The principles stated in the previous part of this opinion, are considered as sustaining the court below on all the points made in the assignment, except as to the questions growing out of the partition of the property, and need not be again, or with further minuteness of application, repeated. The exceptions founded upon the action of the partitioners, although several, resolve themselves into one, and may be stated as follows: "The marital rights of Bell, fully attached upon the property, by virtue of the division of the estate by commissioners appointed by the Court of Ordinary, setting apart Mrs. Bell's portion to him in right of his wife, and it was, therefore, liable to pay his debts; that, by the return of the commissioners, and the acceptance of it by the Court of Ordinary, being, by such acceptance, made the judgment of that court, the portion set apart to Bell, in right of his wife, vested absolutely in him, and is not subject, therefore, to his wife's equity; and that the presiding judge erred in ruling contrary to these positions."

These were the grounds relied upon mainly in the argument; the points made as to the regularity of the proceeding under the order of the court, for a division, and as to the refunding bond, are considered as involved in these grounds. It occurs, then, to the court, that the only question for them to determine is this, to wit: According to the facts, was there such a *reductio in possessionem*, by Bell, the husband, as vested the ownership of the property in him, as against his wife's equity? for, word the exception variously as you may, in our judgment, this is the only point left in the case.

In relation to marital rights, so far as they are concerned with an equitable interest or chose in action, we remark that they are inchoate. They, as against the wife's equity, amount to nothing; and as against her right of survivorship, they are to be considered as a mere right to reduce into possession. The right of property in them exists upon condition; the absolute ownership can be only upon compliance with it. If, in the one case, the wife asserts her equity, or, in the other, the husband dies before he gets possession, his marital right is as though

had never been. All the questions between the wife's equity and the husband, or his assignees, turn upon the possession. They are to be settled upon a fact. The question of possession may be a mixed one of law and fact. It may be, and it is here, an inquiry whether, upon a given state of facts, there is, in the eye of the law, a sufficient possession. But in no case can the rights of parties, thus situated, be adjudged, without a determination of the great issue, was there or not a reduction into possession? Whilst, in this case, we do not hold that there must have been a tradition, by the administrator, into the husband's hands, or a manucaption on his part; yet we do believe there must be an *actual* possession in the husband. A delivery to his agent would be sufficient; a settlement with the administrator—a discharge executed to him by the husband—and afterwards a consent that the property remain with him. So, in many cases, where the property, from its character or its situation, does not admit of immediate personal reception; in short, any acts done, which show the intent of one party to abandon, and the other party to assume, possession, will be sufficient. But, in all cases, there must be facts exhibited to show that the administrator does, in truth, part with the possession, and that the husband does, in fact, with his consent, assume it. Chancellor Harper (in *Perryclear vs. Jacobs*, in 2 *Hill's Ch. Rep.* 509) speaks of the possession required, as an "*actual* possession. Not a legal right, or a property vested by legal implication, but a right, consummated by an actual possession. Such, too, we think, is the view of all the authorities. We deny that, in this case, the property vested in Bell, by operation of law, so as to defeat the wife's equity; and we also deny that the facts show actual possession in him, and are of the opinion, that the decision of the learned judge on the circuit bench was right. The administrator holds the legal title in the property of his intestate; he may alien or encumber it. Does the return of the commissioners divest it? The object of their appointment is not to divest the title of the property, but to separate and apportion it. Their return effects a severance, and ascertains, not only the amount of each share, but (in case of slaves) designates the specific individuals which belong to each. We are not, however, prepared to say, that it is conclusive as to these things. It certainly does not divest the administrator's legal title. Would the facts of this case be sufficient, upon which to maintain an action of trover, in favor of Bell against him? We apprehend not. Would not the plaintiff, in such a suit, be required to show, not only the division of the slaves but an acquittance to the administrator?

The statute of Georgia requires, before the assignment to the distributees of their respective portions, they shall execute, to the administrator, a bond conditioned, to refund their respective proportion of the debts which may be established against the estate. In the action of trover, we are clearly of opinion, that before the plaintiff could recover, he would be held to show the execution or tender of the refunding bond. The record does not show that a bond was given, but the contrary. It appears, from the record, that Bell and wife, not being present or represented, their share was left with the administrator, where it remained until it went into the custody of the law. There was, therefore, no

assignment of it and no bond. The complainant, in the bill, does not claim her equity, under the division of the commissioners and the judgment of the Ordinary thereon. She neither seeks to set it aside nor to affirm it. Her equity rests upon higher ground; it exists anterior to, and independent of it; it attaches upon the property itself, and is spoken of by learned commentators as a lien. Wherever equity can reach the property, if not reduced into possession, before its interposition, by the husband, she will lay her hand upon and hold it, until provision is made for the wife. All, then, the complainant avers, or is interested in showing, as regards the proceedings under the statute, is, that the facts do not prove a reduction into possession before she filed her bill. (This, by the by, in answer to the argument of counsel, to the effect, that a party who claims, under a judgment, cannot attach it for irregularity.)

Again: if the proceedings under the statute vested the property, by operation of law, in Bell, then is the administrator discharged fully of his trust, and if, being still in possession of the property, he makes way with it, he and his securities would not be liable on his bond. We cannot hold to a position, whose results would be thus absurd and unjust. We are of opinion that the property in Mrs. Bell's share, according to the facts of the case, did not vest in her husband. It does not help the matter to say, that the division made the share of Mrs. Bell liable to a levy and sale, and that the purchaser would not get a better title than Bell had. All this may be true, and, so far as the argument affects this case, the reply is, that admitting this to be so, the wife's equity may be asserted equally and at all times against the husband, his assignees, his creditors and purchasers under execution against him. She will not be compelled to stand by until a sale, and then go upon the purchaser, who may buy subject to her equity. Equity will give her relief by enjoining creditors, and settle her rights, whenever the property is within its reach.

As to the possession, the bill states that Bell never had the possession, and that it never was out of the administrator. The demurrer admits the truth of these statements, and perhaps it would be safe to rest this point here. But if it be, as it was contended, that the bill and its exhibit, viz., the return of the commissioners and the judgment of the court thereon, prove that there was possession, then let us look into that exhibit and see how the matter stands. There was in truth no order taken to make the return the judgment of the court—it was spread upon the records however, and we are willing to admit that this is presumptive proof of its having been made the judgment of the court. Now, the judgment is co-extensive only with the return—in other words, the return is the judgment. What, then, does the return prove, as to Mrs. Bell's share? It proves that certain slaves were *set apart* for Bell in right of his wife, not *assigned* to him. Just as the minor child's part was *set apart*, there being no guardian to receive it. It proves, for it says, that there was no representative of Bell to receive it, and for that reason the return declares that it *was left with the administrator*. It was left with him, to be paid over to Bell, beyond all doubt, when he should apply for it and give the bond which the law requires. And we must believe that it was the intention of the commissioners that the administrator should keep the property, until the law was complied with. What, then, does

the court adjudge? Why, among other things, that the *property is in the hands* of the administrator. So far, therefore, from the proceedings showing possession in Bell, we are satisfied that they, on the contrary, show possession in the administrator; and it continued in him until the property was seized by the sheriff. This was property which from its nature and position was capable of actual delivery; we think there was no *actual* possession, or proof of anything equivalent to it, and confirm the judgment of the court below.

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DAMAGES.

1. The final judgment or decree of the court in the case in which the injunction is sanctioned, affords the only legal evidence of the measure of damages to be recovered in a suit upon the injunction bond.—*Lockwood vs. Saffold*. 73-4

2. The measure of damages in an action against an attorney by his client for money collected and not paid over, is the amount collected, with interest thereon from the time it was demanded, or from the date of its reception, if the attorney failed to give notice thereof to his client, or wilfully misapplied or appropriated it to his own use.—*Nisbet vs. Lawson*. 286-8

Damages may be increased by interest.—*ib.* 287-8

4. For the measure of damages in Covenant upon breach of warranty in the sale of an unsound slave.—See *Covenantant, Broughton vs. Badgett*. 592

DECREE IN EQUITY.

1. Where a decree in equity against a guardian is silent as to the time when he committed the devastavit, and where the security was discharged by the Court of Ordinary before the suit in which the decree was rendered was commenced, the decree is insufficient in itself, and cannot relate back so as to charge the security in a suit against him upon the guardian's bond.—*Bryant, Guardian, &c., and Beall, Ex'or of Pye vs. Owens and wife*. 372-5

DEEDS.

1. A deed to land delivered in the presence of two subscribing witnesses, and acknowledged before a justice of the peace, and recorded in the clerk's office of the Superior Court in the county where the land lies, though the acknowledgment is without date or place, is admissible in evidence in the courts of Georgia, under the Registry Acts thereof, without further proof.—*Doe ex dem. Truluck et al. vs. Peebles et al.* 5

2. In such case the court will presume, in the absence of proof to the contrary, that the acknowledgment before the magistrate was made where the deed itself purports to have been made; and at the time it purports to bear date.—*ib.* 5

DELIVERY.

1. The question of delivery by the vendor, and acceptance by the vendee, is always a question of fact, exclusively for the jury.—*Johnson vs. Watson*. 352

2. Delivery must accompany a parol gift of a slave, to make it valid.—*Anderson and wife vs. Baker*. 598-602

3. When the donor remains in possession, a delivery cannot be presumed without evidence of some act on the

part of the donor from which a delivery may be inferred.—*ib.* 598-602

DEMURRER TO BILL IN EQUITY.

1. When there is a general demurrer to the whole bill, and the complainant is entitled to an answer to part, either as to the discovery or relief prayed, the demurrer will be overruled.—*McLaren vs. Steapp.* 377-8

DEMURRER TO PLEA.

1. It is the right of a plaintiff to demur at law to a plea, for want of sufficient fullness, before issue joined upon it before the jury. The practice under our Judiciary Act of 1799 has been to demur orally, not formally and in writing, as in England; nor is the judgment of the court upon such demurrer formally pronounced and recorded with us, as in the English courts.—*Winkler vs. Scudder.* 134

DISCONTINUANCE.

1. The entry on the Bench Docket of two general continuances, without anything appearing upon the minutes of the court, will not work a discontinuance of a cause, so as to entitle the defendant to a judgment of *non pros.*, under the law and rules of practice in this State.—*Nisbet vs. Lawson.* 279

DOCKETS.

1. The Motion Docket is not a record; the entries upon it are mere memoranda of the judge, kept by him for his own convenience.—*Bryant, guardian, &c., and Beall, ex'or of Pye, vs. Owens and wife.* 367

E.

ELECTION.

1. When a testator bequeaths a slave (belonging to his son A) to his sons B and C, and in the same will gives to his son A a legacy of \$500, A will be put to his election which he will take; and equity will compel him, either to relinquish his claim to the slave, or the bequest under the will.—*McGinnis vs. McGinnis.* 501-10

2. It is sufficient to raise a case of election, that the testator does dispose of property *not his own.*—*ib.* 501-10

3. The doctrine of election does not apply to *residuary legatees as such.* The same individual, however, may be both a *specific* and *residuary legatee.*—*ib.* 501-10

4. There is no time prescribed within which either party shall claim the right of putting the other party to elect. Each case must depend upon its own circumstances.—*ib.* 501-10

5. When the recusant legatee will be required to refund the legacy, or restore the property recovered by him. See *Legatee.*—*ib.* 501-10

ENDORSERS.

1. Accommodation endorsers are not liable to contribution as sureties in Georgia, either at common law or under the act of 1826.—*Stiles vs. Eastman et al.* 210

2. Separate judgments are rendered against the endorsers of the same note; the two last, by agreement with the plaintiffs, take an assignment of the judgment against the first endorser, and pay the plaintiffs the amount due upon the judgments against themselves which are entered, satisfied. Held that the judgment so assigned is not extinguished by the satisfaction of the judgments against the two last endorsers, and that they might proceed, under such assignment, with the *fi fa*, against the first endorser, and by levy and sale reimburse themselves the amount paid out by them; it appearing that they were not interested in the consideration for which the endorsed note was given.—*ib.* 210-11

3. The control of an execution against the maker and prior endorsers, as provided for by the act of 1839, should be obtained under an order of the court whence the execution issued, upon the showing required by that act, in which it is not necessary to show, that the payment by the subsequent endorser was forced by levy; it may be voluntary, and yet, in

- of the law, it is a payment under the compulsion of legal process.—*ib.* 211
4. The endorser of a note is an *incompetent* witness on the ground of *interest*, to prove the payment of money by him to the attorney of the plaintiff, in an action against the attorney, unless released.—*Nisbet vs. Lawson.* 282-3
 5. As between the holder of a Banker's check and the endorser, it should be presented for acceptance with due diligence.—*Daniels vs. Kyle and Barnett.* 306
 6. In a suit by the Central Bank of Georgia, no proof of notice, demand or protest, is necessary to charge the endorser.—*Merchants' Bank vs. The Central Bank.* 432-4
 7. In a case where the holder of an endorsed paper fails to give notice of its dishonor, where notice is necessary to charge the endorser, and he is therefore released in law, and the holder then transfers it to the Central Bank; although on the trial the bank is not bound to prove notice, demand, or protest, yet the endorser would be let into his defence, and would be permitted to show by proof his discharge for want of notice.—*ib.* 434-5
- EQUITY.**
1. What parts of an answer to a bill in equity will be considered, upon a motion to dissolve an injunction, see *Moore vs. Ferrell et al.* 9
 2. Equity will protect persons in the use, integrity, and value of their property against waste or trespass, where courts of law cannot, because of the tardiness of the remedy, the peculiar nature of the property injured, the insolency of the wrong-doer, or the plaintiff's inability to prove his damage.—*ib.* 10
 3. But equity will not intermeddle with the title of the property, the subject of the waste or trespass.—*ib.* 10
- How far a defendant's answer is evidence for him, see *Eastman, et al. vs. McAlpin.* 170
5. What parts of the answer must be proved.—*ib.* 170
 6. Equity will not relieve an administrator after two judgments, *de bonis testatoris* and *de bonis propriis*, have been successively recovered against him at law.—*Bostwick vs. Perkins, Hopkins, and White.* 137-40
 7. For case where equity will relieve against *mistake* in an agreement either as to fact or law, see *Rogers vs. Atkinson et al.* 23-27. *Collier, [admin.] vs. Lanier.* 239-40
 8. In all cases of *account* where the remedy of the plaintiff would not be as adequate and complete in a court of law as in a court of equity, either from defect of proof, or other impediment, or for the purpose of avoiding a *multiplicity of suits*, the jurisdiction of the latter court attaches.—*McLaren vs. Steapp.* 377-8
 9. When the plaintiff in the first instance is entitled to a discovery, the court will not only give him the discovery, but will (on a proper prayer for that purpose) decree the appropriate relief.—*ib.* 377
 10. A court of equity will decree a defendant to account for money overpaid upon a usurious contract.—*ib.* 377
 11. In the distribution of a fund raised by the sale of the effects of an insolvent bank amongst the bill-holders, it is clear equity, that the bill-holders should respectively receive only in proportion to the *quantum of consideration* paid for the bills.—*Collins vs. The Central Bank et al.* 460
 12. Where a party comes into a court of equity to ask its assistance to interfere with the legal administration of the assets in the hands of the executor or administrator, he should at least state a clear *prima facie* case on his part, to justify such interference.—*Mills et al. vs. Lumpkin, admr.* 513-14.

ERROR.

1. The refusal to allow a security on appeal to be discharged and others substituted in his place, with a view to render him a competent witness for the appellant, is error.—*Davis et al. vs. Anderson et al.* 192-3

ERROR, WRIT OF.

1. Within what time bill of exceptions to be drawn up, and within what time to be signed and certified by the presiding Judge, see *Doe ex dem. Truluck vs. Peeples et al.* 2
2. What the bill of exceptions must specify.—*ib.* 2
3. When bill of exceptions will operate as a Supersedeas.—*ib.* 3
4. A writ of error will not be sustained, even under the statute organizing the Supreme Court, on account of the court below refusing to grant a continuance in a cause, unless it is a most plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested in it by law.—*Sealy vs. The State.* 215
5. The Supreme Court will not entertain a writ of error upon points, which, so far as the record discloses the testimony, do not spring out of the evidence or the pleadings.—*Smith vs. Kershaw.* 259
6. The Supreme Court will not take cognizance of any testimony whatever, that is not certified up according to law.—*ib.* 260
7. It is a general rule that no person can bring a writ of error to reverse a judgment, who was not a party, or privy, to the record, or prejudiced by the judgment.—*Townsend & Brothers vs. Davis.* 496
8. Whether a plaintiff in error be a party or privy, or is aggrieved by the judgment, must appear by the record.—*ib.* 496
9. Writ of error will be dismissed, if the assignment of errors is not filed on or before the first day of the term.—*Girtman vs. the Central R. R. and Banking Co.* 107

ESCAPES.

1. An action against a sheriff, for an escape out of final process under the statutes of Georgia, survives against his representatives.—*Neal vs. Haygood, admr.* 515-18

ESTATES, LIMITATION OF.

1. A bequest to the daughter "during her natural life, and the heirs of her body forever" vests in her the absolute title in fee.—*Choice vs. Marshall.* 102-7

ESTOPPEL.

1. A party claiming under a grantor, as distributee, or legatee, cannot impeach his deed for want of consideration, or for fraud. Both the grantor and his privies are stopped from denying it.—*The admrs. of McCleskey vs. Leadbetter.* 557

EVENTUAL CONDEMNATION MONEY.

1. The "eventual condemnation money" secured by an injunction bond, is the amount ultimately fixed and settled by the judgment or decree of the Court.—*Lockwood vs. Saffold.* 73-4

EVIDENCE.

1. When a deed recorded will be admitted in evidence without further proof, see *Doe ex dem. Truluck vs. Peeples et al.* 5
2. Facts that occurred at or about the time of the fatal rencounter, involving the conduct of the deceased, which might have been observed by the slayer, are competent, and admissible in evidence, without precedent proof that he had notice of them.—*Reynolds vs. The State.* 230
3. Books of accounts about to be tendered in evidence, must be first proved to be the original books of entry by the oath of the party introducing them, and then be submitted to the inspection of the court, and, if found free from all fraudulent appearances or circumstances, such as material

- gross alterations, false additions, &c., and to contain the first entries or charges by the party, made at or near the time of the transaction to be proved, they are competent. If the contrary is discernible from the books themselves, or comes out upon the examination of the party, they ought to be rejected. The credibility both of the books and of the party, is to be weighed by the jury, and depends upon various circumstances of which they are the judges.—*Taylor vs. Tucker.* 233
4. Separate sheets of paper containing the original entries of an account for lumber, though such sheets are attached to the declaration as a bill of particulars, are admissible in evidence upon the footing of original books of accounts, and under the same rules and restrictions as are prescribed by the courts in the case of merchants' and shop-keepers' books. It is not material whether the original entries of an account be made in a book, or upon a separate sheet of paper; it is only material that it be an account of the dealings between the parties, and be primary and original.—*ib.* 234
5. When the plaintiff's only evidence is his original books, it becomes indispensable to prove *aliunde*, by one or more persons having dealt with him, that he was in the habit of keeping correct accounts.—*ib.* 234
6. An execution issued from a decree of a court of equity against a guardian, individually, upon a bill filed against him as guardian, charging waste, and seeking to render him liable in his individual, and not in his representative character, and the execution returned *nulla bona*, is admissible in evidence in a suit upon the guardian's bond against the security.—*Bryant, guardian, &c., and Beall, ex., vs. Owens and wife.* 368
7. A decree against the guardian is only *prima facie* evidence of a devastavit as against the security, not conclusive. It is subject to be rebutted by counter-testimony in behalf of the security, who will be permitted to inquire, *ab origine*, into the justice of the decree.—*ib.* 369-71
8. A decree in equity against a guardian, which is silent as to the time of the devastavit committed, is insufficient alone to prove waste against the guardian, so as to charge a security who was discharged by the Court of Ordinary, before the suit in which the decree was obtained was commenced—it nowhere appearing in the record that such waste was committed anterior to the discharge of the security.—*ib.* 372-5
9. Where A endorses a note to B "to be liable only in second instance," and B sues C, one of the makers, who pleads a release from A, while the holder of the note, and is discharged by the judgment of the Justice's Court, that judgment is only *prima facie* evidence, at best, in a subsequent suit against A. To make it conclusive testimony of B's right to recover, notice to A of the first action was indispensably necessary.—*Brown vs. Chaney.* 412-15
10. Parol evidence is inadmissible to vary or add to a record.—*Stell, guardian, vs. Glass.* 485
11. Parol evidence is admissible to rebut an allegation that an order of the Court of Ordinary was fraudulently procured.—*ib.* 485
12. The fact of death may be proven by presumption as well as by direct evidence.—*Doe ex dem. Cofer et al. vs. Flanagan.* 543
13. When a person goes abroad, and is not heard of for a long time, the presumption of the continuance of life ceases at the end of seven years, from the period at which he was last heard of.—*ib.* 543
14. The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time, when they were last known to be living.—*ib.* 543
15. A deed which recites a former deed,

- and its loss, is evidence of the first deed, and the grantor and his privies are estopped by the recital.—*Admrs. of McCleskey vs. Leadbetter.* 557
16. Ancient documents admissible in evidence without proof of execution.—*ib.* 557
17. When testimony taken by commission should be rejected, see *ib.* 554-7
18. When a negro, alleged to have been stolen, is charged in the indictment to be the property of the prosecutor, evidence that he was the purchaser of the negro at Sheriff's sale, under the incumbrance of a mortgage, after condition broken, as the property of the prisoner, coupled with the lawful possession, was held to be sufficient to maintain the allegation.—*Robinson vs. The State.* 572-3
19. In an action upon a sheriff's bond against his sureties, his admissions are *prima facie* evidence to charge them, unless made fraudulently, or by mistake, or having relation to money, the paying over of which is not guaranteed by the bond.—*Stephens et al. vs. Crawford, Governor, use, &c.* 578-9
20. A certified copy of the record of the action of the Inferior Court, in taking a sheriff's bond, made in vacation, is not evidence in a suit against the sureties, because, as to that, the action of the Inferior Court is ministerial and not judicial.—*ib.* 579
21. *Parol evidence* is inadmissible to contradict or vary the terms of a written agreement.—*Rogers vs. Atkinson, et al.* 18
22. When the contract is reduced to writing, conversations or stipulations, anterior to, or contemporaneous with, the written instrument, are supposed to be merged in it, and are not allowed to be proved by *oral testimony*—*ib.* 20
23. If it were not necessary in the first instance, to have the contract reduced to writing, *parol evidence* may be received of conversations and circumstances, subsequent to the time of making the agreement, to show that the parties, upon sufficient consideration, consented afterwards to vary the contract, or add some new stipulation.—*ib.* 22
24. *Parol evidence* is admissible to explain latent ambiguities, to rebut an equity, and to contradict a receipt.—*ib.* 23
- EXCEPTIONS, BILL OF.
1. Must be drawn up by the party or his attorney, within four days after the trial in which the decision complained of was made; and must be certified and signed by the presiding Judge within that time.—*Doe ex dem. Truluck et al. vs. Peeples et al.* 2
 2. Must plainly and distinctly specify the errors complained of.—*ib.* 2
 3. Will operate as a supersedeas only, where bond and security has been given or affidavit filed, in conformity with the act organizing the Supreme Court.—*ib.* 3
- EXECUTION.
1. An execution is valid, issued from a confession of judgment, which appears on the writ, and which has been registered, together with the declaration and judgment, upon the permanent records of the court, although the clerk omitted to enter such confession on the minutes.—*Davis vs. Barker.* 560-3
- EXECUTORS AND ADMINISTRATORS.
1. Co-Executors and Administrators are, in the eye of the law, considered as but one person for many purposes; and the acts of one will be considered as the acts of all, in reference to the administration of the assets. But one co-executor or administrator cannot be made chargeable with the devastation of his companion, when he has not in any manner contributed thereto.—*Cameron vs. The Justices, &c.,* 37
 2. By the laws of England as adopted

- in Georgia, an administrator *de bonis non*, cannot call the representatives of a deceased executor or administrator to account for any property which their testator or intestate converted or wasted; nor can he claim or recover anything but those goods, chattels, and credits which remain in specie, and are capable of being identified as the property of the first testator or intestate.—*Thomas vs. Hardwicke, Ex'r*, 83
3. Suits for assets wasted or converted, may be brought directly by creditors, legatees and distributees.—*ib.*, 82
 4. The act of 1821, passed for the better protection of the estates of orphans and for other purposes therein mentioned, does not deprive persons interested of this common-law right, but was intended to afford them additional remedies.—*ib.*, 82
 5. In what case equity will not relieve an administrator after judgment against him at the suit of a creditor, see Equity.—*Bostwick vs. Perkins, Hopkins and White*, 137
 6. An executor is bound to return to the Court of Ordinary an inventory of the partnership effects, in which his testator had an interest as co-partner. If not in his power to procure a complete and perfect inventory, then he should return his testator's interest in the partnership property to the best of his ability; the amount of stock on hand at the time of his death, the amount of debts due from and to the co-partnership. The Court of Ordinary, in such case, will exercise a sound discretion as to the kind of inventory they will accept.—*The Justices, &c., vs. McLaren*, 291
 7. Where the testator left a will, naming several executors, to whom he bequeathed, in trust for certain grandchildren, a portion of his estate: One of the executors only qualified, and, receiving the trust property, afterwards died intestate, before the trust thus devolved on him was entirely executed. After his death, another of the executors named in the will qualified within the twelve months provided by statute. The last qualified executor is entitled to the possession of the unadministered portion of the trust estate, and not the administrator of such deceased executor.—*Crafton vs. Beall et al.*, 322
 8. The administrator of a deceased executor is not the representative of such executor's testator.—*ib.*, 322
 9. The whole interest in an intestate's personal estate vests in his administrator, on the grant of letters of administration; and such grant has relation to the time of the intestate's death.—*Liptrot, Adm'r, vs. Holmes*, 388
 10. Against the right of action to recover the property of an intestate, the statute of limitations will not commence to run until administration of his estate has been granted.—*Doe ex dem. Conyers, Adm'r, vs. Kennon et al.*, 379
See also *Doe ex dem. Cofer vs. Flanagan*, 539-42
 11. When a court of equity will interfere with the legal administration of the assets in the hands of an executor or administrator. See Equity.—*Mills et al., vs. Lumpkin, Adm'r*, 513-14
 12. Executors and administrators of deceased sheriffs may be made parties in suits instituted against their testators or intestates for escapes out of final process, under the statutes of Georgia.—*Neal vs. Haygood, Adm'r*, 515-18
 13. An executor, under a will, authorizing the sale of property of the testator to pay debts, but without specifying the manner, may dispose of testator's slaves at private sale, and without previous advertisement of the same, or leave of the Court of Ordinary; and the purchaser at such private sale will acquire a good title, even as against the creditors of the testator, provided that the purchase is *bona fide*, and without fraud on the part of the purchaser.—*Bond and Murdock et al. vs. Zeigler*, 346

F

FINES.

1. A fine remitted by an Executive pardon, being in the hands of the attorney-general, or other officer of court unappropriated in the manner prescribed by law, will be refunded under an order of the court, by rule against such officer.—*In the Matter of the Attorney-General.* 607-10

G

GARNISHEE.

1. The question whether a Garnishee is liable for interest upon the fund in his hands, or the debt owed by him, which is sought to be recovered by process of garnishment, is not one of strict law, but of discretion, depending upon considerations of equity, growing out of the facts and circumstances of the particular case.—*Georgia Insurance and Trust Co. vs. Oliver.* 39
2. When the Garnishee resists the payment of the fund in his hands into court, or controverts his indebtedness, he will be held liable for interest.—*ib.* 41
3. It is a general rule, however, that persons who are prevented from paying over money by process of the court, summons of garnishment, writs of injunction, and the like, are not liable for interest.—*ib.* 40

GENERAL ISSUE, PLEA OF.

1. Under the Judiciary Act of 1799, requiring the answer of the defendant to set forth plainly, fully, and distinctly the cause of his defence, illegality of the consideration cannot be given in evidence, under the plea of the general issue to an action of assumpsit on a bill of exchange, at the instance of the holder against the drawer and acceptor.—*Johnson et al. vs. Ballingall.* 70
2. So also a special agreement.—*Buchannon et al. vs. Jones.* 257

GIFT.

1. To constitute a valid parol gift of a chattel, there must be an immediate delivery of the same by the donor to the donee.—*Anderson and wife vs. Baker.* 601
2. The bare declaration of the donor that "she had given certain negroes to the donee, and had no right to sell them," is not sufficient to pass the title to the donee, without evidence of some act, from which the jury may presume a delivery of the property, where the donor remains in possession of the property, exercising dominion over it until her death. 601-2

GUARDIANS.

1. The estate of a guardian, who dies chargeable to his ward, is liable and bound therefor, before any other debt, though such other debt, may have been prosecuted to judgment, against the guardian in his lifetime.—*Watson et al. vs. Ex'or of Watson et al.* 268
2. In a suit upon a guardian's bond, the party is not entitled to the custody of the original, but to a certified copy only.—*Bryant, guardian, &c. and Beall, ex'or of Pye, vs. Owens and wife.* 368
2. In a bill filed by a ward to recover the trust fund out of the hands of the former guardian, he will be allowed to prove the payment of debts contracted on account of his ward before, but not discharged until after his dismissal, and that too without having the vouchers for these disbursements allowed by the Court of Ordinary.—*Stell, guardian, &c. vs. Glass.* 435-6
4. An order of the Court of Ordinary authorizing a guardian to invest the funds of his ward in the purchase of land for the purpose of cultivation cannot be impeached in any other court except for fraud.—*ib.* 486

H

HUSBAND AND WIFE.

1. At common law marriage an

- to an absolute gift to the husband of all the personal estate of the wife, of which she is at the time actually possessed in her own right.—*Bell et al. vs. Bell.* 639-47
2. In the wife's choses in action, the husband acquires only a qualified property, which may be made absolute by a reduction into possession during life.—*ib.* 639-47
 3. The wife is entitled in equity to a suitable provision for herself and her children out of her fortune, whenever it is within reach of a court of chancery, and not reduced into possession by the husband; and this right extends both to legal and equitable claims in action.—*ib.* 639-47
 4. Whether the children have a distinct substantive right to a provision out of her claims in action.—*Quere? ib.* 639-47
 5. The wife may file her bill, by her next friend to assert her equity.—*ib.* 639-47
 6. The wife's equity is good against her husband's assignees in bankruptcy or insolvency, against his assignees to pay his debts generally, and also against a special assignee or purchaser for value.—*ib.* 639-47
 7. When the wife's father leaves an estate in negroes, a division of the negroes under our statute, at the instance of the administrator, setting apart one share to the husband in right of his wife, and leaving it in the possession of the administrator, neither the husband nor wife being present, nor represented, and no refunding bond being given, is not such a reduction into possession as will defeat the wife's equity.—*ib.* 639-47
- I
- INDICTMENT.
1. Under an indictment for murder, the jury may find the prisoner guilty of the lesser offence of manslaughter, whether voluntary or involuntary, and verdict will be legal, although no count for manslaughter in the indictment.—*Reynolds vs. the State.* 227 and 229
- INJUNCTION.
1. Service of the rule nisi upon the complainant's solicitor, stating the grounds of the application, and fixing the time and place of hearing the motion to dissolve an injunction, on the coming in of the answer, is sufficient service.—*Moore vs. Ferrell et al.* 9
 2. When the answer plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based, the injunction will be dissolved.—*ib.* 9
 3. Upon a motion to dissolve an injunction the court will look to such parts of the answer *only* as are responsive to the bill.—*ib.* 9
 4. Injunction will be granted to stay trespass, when, from its nature, or the circumstances of the parties, the remedy at law cannot be full and adequate.—*ib.* 10
 5. An injunction will not be dissolved upon the ground that the title of the complainant is questioned by the answer. But when the title is denied, the court will look more closely to the character of the trespass.—*ib.* 11
 5. An injunction will not be granted to stay a sale under an execution, on the ground that the judgment has been fully satisfied, inasmuch as the party has a prompt and adequate remedy at law. It is otherwise when the bill charges, that the payment has been made by the representatives of the principal defendant, or a third person, under a fraudulent combination to oppress the complainant, and that the facts attending the transaction rest in the knowledge of the defendant alone, and can only be obtained by an appeal to their consciences.—*Rogers vs. Atkinson, et al.* 26-7
- [INSTRUMENTS.]
1. A bill of sale to a slave containing warranty of soundness is neither at common law, the statute of Anne, nor

by our own act of 1799, negotiable by endorsement, so as to vest in the endorsee a right of action on the warranty—*Broughton vs. Badgett*. 77

2. The act of 1799 makes the instruments therein enumerated negotiable, in such manner and under such restrictions as are prescribed in the case of promissory notes. They must be payable to the payee's order or assigns, or to bearer, as prescribed by the statute of Anne.—*ib.* 77

3. Whether an instrument under seal can be transferred by an endorsement not under seal.—*Quere? ib.* 76

4. The act of 1799 has reference exclusively to liquidated demands, whether for money or other things, and applies to those instruments alone which are for payment of an ascertained sum of money, or of some specific article or articles of property.—*ib.* 77-8

5. A specialty is defined by Littleton to be a bond bill, or such like instrument; a writing or deed under the hand and seal of the parties.—*ib.* 77

6. An instrument as follows, to wit, "We have this day sold to J. L. & Co. our entire crop of cotton, at 9 cents per lb., all round, and should they not realize that amount net, we agree to make good the loss (signed) D. M. L., F. D. W., is the joint instrument and undertaking of the makers D. M. L. and F. D. W. and is sufficiently certain, and reciprocal to support an action under proper averments and proofs, by either of the parties against the others.—*Jernigan et al. vs. Wimberly*. 221

7. The rule as to certainty is, that the agreement must be so certain and complete, that each party may have an action upon it.—*ib.* 221

8. The omission of J. L. & Co. to subscribe the instrument does not invalidate it. Nor would that omission form any legal objection to an action against them for the stipulated price of 9 cents per lb. for the cotton there-by sold and delivered.—*ib.* 221

INTEREST.

1. In what case damages may be increased by interest. See tit. *Damages*, *Nisbet vs. Lawson*. 287-8

2. In a suit upon a note payable upon time, with interest from date if not punctually paid, the back interest is recoverable as stipulated damages.—*Alexander vs. Troutman*. 472-4

3. If, in entering up the judgment, such back interest is not computed, the judgment may be afterwards amended, under an order of the court, so as to include the interest from the date; and the collection of it may be enforced, though the original execution had issued and been returned satisfied.—*ib.* 469-75.

INTERROGATORIES.

1. Where cross-interrogatories have relation to the subject matter of the direct examination, and the commission is returned, with the cross-interrogatories, or any one of them, unanswered, the whole of the testimony ought to be withheld from the Jury.—*The adm'rs of McClesky vs. Leadbetter*. 554-7

IRREGULARITIES.

1. Whenever proceedings in Court are irregular, application to set them aside should be made in the first instance. If the party after discovering the irregularity proceed himself and take subsequent steps in the cause, or lie by and suffer the other party to do so, the court will not assist him.—*Evans vs. Rogers*, 466-7

J.

JOINDER OF COUNTS.

1. Different Counts may be joined in all cases, where the same judgment can be rendered; and where different pleas are put in, provided the same judgment may be rendered on all the counts.—*Mahaffey vs. Petty et al.*

JUDGE.

1. The judge has no right to charge what construction the jury are to put upon the facts submitted to their consideration.—*Taylor vs. Tucker*. 235
2. It is error in the court, and a new trial will be granted for misdirection, if the style of the charge is such as to mislead the jury in mistaking it for direction in point of law, instead of the mere expression of the opinion of the court upon the facts.—*Stell, guardian, vs. Glass*. 486-9
3. For judge's power at Chambers, see title, Chambers.—*Walton Ex'or vs. Jones*. 303
4. Decision of judge at Chambers will be revised by the Supreme Court upon writ of error.—*Moore vs. Ferrell et al.* 6

JUDGMENT.

1. The dismissal of an appeal is a judgment of the court remitting all parties to the condition and rights which they occupied and held at the time the appeal was entered. So of the withdrawal of an appeal.—*Hardee et al. vs. Stovall, Simmons & Co.* 95-6
2. Where no judgment has been signed, but a verdict rendered and an appeal taken and withdrawn, the verdict is revived, and judgment may, as matter of right, be entered up, *nunc pro tunc*.—*ib.* 95
3. A judgment lien is not extinguished by an appeal being taken, but suspended.—*ib.* 95
4. A defendant in a judgment recovered under a special statute, is not precluded of his right to a motion to quash the proceedings, or arrest the judgment, because the act points out the mode of contesting the amount due, &c.—*Robinson vs. Steamer Lotus, and owner*. 317-19
5. A judgment is only *prima facie* evidence against one who was not a

party, or privy, and who had no notice of the action in which it was rendered, nor opportunity of defence, nor of appeal.—*Brown vs. Chaney*. 412-15

6. An execution issued from a confession of judgment is valid, though the clerk omitted to enter the confession upon the minutes, see Execution.—*Davis vs. Barker*. 560-3
7. An entry of confession of judgment, on the declaration of file in the clerk's office, is sufficient, (in the absence of all proof to discredit the memorandum,) to authorize the court wherein it was made to have it transcribed on its minutes, at any subsequent term, in order to preserve their harmony.—*ib.* 560-3
8. No notice to the defendant is necessary to warrant an application to the court, to enter such confession, *nunc pro tunc*.—*ib.* 560-3
9. Is it necessary that a confession of judgment, which is the act of the party only, should appear on the minutes? And can a claimant, after issue joined, and a trial on the merits, except to the regularity of the previous proceedings in the cause. *Quere?*—*ib.* 560-3

JURORS.

1. The State has no right to pass jury-men by, or cause them to stand aside, until the whole panel is exhausted before showing cause of challenge. See Challenge.—*Sealy vs. The State*, 215-17; *Reynolds vs. The State*. 228
2. What will disqualify a juror from sitting in a criminal case, see *Reynolds vs. The State*, 229; *W. J. Boone vs. The State*. 633
3. How the challenge, "*propter affectum*," may be made available, see *Jones vs. The State*, 571; *K. P. Boone vs. The State*. 610-31
4. Challenging the array, and for what cause, see *W. J. Boone vs. The State*. 633

5. Judge's charge to the jury, see *Taylor vs. Tucker*, 235; *Stell, guardian, vs. Glass*. 486-9

L.

LAWs, CONSTITUTIONALITY OF.

1. A law which merely inhibits the wearing of certain weapons in a *concealed manner* is valid; but so far as it cuts off the exercise of the right of the citizen altogether to *bear arms*, or under the color of prescribing the *mode*, renders the right itself useless, it is in conflict with the Constitution, and void.—*Nunn vs. The State*. 246-51
2. The act of 1833, giving the State half the number of challenges allowed the prisoner, is constitutional.—*Jones vs. The State*. 616
- Also the act of 1843, see *K. P. Boon vs. The State*, 619

LEGATEE.

1. In what cases he is bound by the doctrine of election. See title, Election.—*McGinnis vs. McGinnis*. 501-10
2. When he will be required to refund the legacy or restore the property recovered.—*ib.* 501-10
3. Legatees, distributees and creditors may sue a removed executor or administrator for assets wasted.—*Thomas vs. Hardwicke, Ex'or.* 82

LIEN.

1. A purchaser, at sheriff's sale, of stock or shares of a corporation, with notice of a lien of the company upon such stock, under a by-law of the corporation, for the indebtedness of such corporator to the company, (the lien created by such indebtedness under the by-law, being prior, in point of time, to the lien acquired under the judgment,) purchased only such title as was in the corporator, and no other, and therefore was not entitled to a transfer of the stock so purchased, under the act of 1822, without first discharging the lien created by the corporator's indebtedness under the by-law.—*Tuttle vs. Walton*. 51

2. The lien of a judgment is not extinguished by an appeal being taken, but suspended. Although the appeal opens all the merits of the issue, yet it does not vacate the first verdict or judgment. This effect is worked only when, there being a rehearing, there is a new verdict rendered and a judgment on the appeal; and not even then so as to authorize alienation of property intervening the two judgments.—*Hardee et al. vs. Stovall, Simmons & Co.* 95

3. It is not sufficient, in proceeding under the act of 1841, giving to all persons employed on steamboats, and other water craft, on the Chattahoochee, Altamaha, and Ocmulgee rivers, a lien on such steamboats or watercraft, for wages, &c., for the plaintiff or affiant to swear to the amount due for services rendered on board such boat, without further showing the case to be within the provisions of said act, either in the pleadings in the form of a petition, or in the affidavit by way of recital. The act being in derogation of the common law, must be strictly construed.—*Robinson vs. Steamer Lotus, and owner*. 317-19

4. For lien of bill-holders, Monroe Railroad and Banking Company, see *Collins vs. The Central Bank et al.* 454-61

LIMITATIONS OF ACTIONS.

1. The act of June, 1806, providing that where any action shall be instituted within time, and the plaintiff be nonsuited, or shall discontinue the same, after the time of limitation is expired, he shall be permitted to renew his action within six months thereafter, once only, and not after, was repealed by the act of December, of the same year.—*Harrison et al. vs. Walker*. 35
2. Against the right of action to recover the property of an intestate, the statute of limitations will not commence to run until administration of his estate has been granted.—*Doe ex dem. Conyers, admr. vs. Kennon and Kennon*. 379-
3. See also *Doe ex dem. Cofer admr. Flanagan*.

LIMITATION OF INDICTMENTS.

1. The statute of limitations does not run against an indictment found for murder, though on the traverse the prisoner is found guilty of manslaughter.—*Reynolds vs. The State.* 227
2. Upon an indictment found for manslaughter only, the statute would run from the death, and not from the time the mortal wound was given.—*ib.* 228

LIQUIDATED DEMANDS.

1. For what are liquidated, and unliquidated, demands, see *Nisbet vs. Lawson.* 287-8

LOST PAPERS.

1. A copy of a guardian's bond, where the original is lost or destroyed, pending the suit, cannot be established under the 49th rule of the Superior Courts, because such bond is not an office paper of those courts.—*Bryant, guardian, &c. and Beall ex'r of Pye vs. Owens and wife.* 368

M.

MANDAMUS.

1. The writ of mandamus is grantable at any time, either in vacation or in term, upon proper cause shown.—*Johnson vs. The State ex rel. Brannon.* 273-4
2. In all cases, however, where the parties' rights may depend upon an issue of fact, the writ must be made returnable before the judge in term.—*ib.* 273-4

MISTAKE.

1. Equity relieves against mistakes, as well as frauds, in a deed or contract in writing; and this, whether the plaintiff seeks relief, affirmatively on the ground of mistake, or where the defendant sets it up as a defence, or to rebut an equity.—*Rogers vs. Atkinson et al.* 23-7

2. Where an instrument is drawn and executed for the purpose of carrying into effect a contract, written or parol, previously entered into, and which by mistake of the draftsman, in fact or in law, does not fulfill the intention of the parties, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement.—*ib.* 24-27

See also *Collier, Ad'r, vs. Lanier.* 239-40

MONEY HAD AND RECEIVED.

Per Nisbet, J.,

1. The action for money had and received, is an equitable action, extensively remedial, yet it is subject to rules. It does not give to courts of law jurisdiction which belongs to courts of equity.—*Whitehead vs. Peck,* 148
2. This action does not lie where there is not a contract express or implied between plaintiff and defendant. There must be such a contract as creates a privity between the parties.—*ib.* 149
3. It does not lie to enforce every imaginable equity between man and man, growing out of moneyed transactions.—*ib.* 149
4. It lies in all cases where money is in the hands of another, which, *ex aequo et bono*, the plaintiff is entitled to recover, and which the defendant is not entitled in conscience to retain. Yet this good and just right in the plaintiff, and this conscientious inability in the defendant grow out of privity of contract either express or implied in law.—*ib.* 149
5. When a security, who is indemnified by mortgage, voluntarily pays aurious note, and is subsequently reimbursed by his principal, in property, the latter cannot recover of the creditor the excess of interest in an action for money had and received.—*Per Lumpkin, J.—ib.* 143-148
6. Usury paid by a surety may be recovered back by him, in this form of action, but not by the principal, though he has reimbursed the surety. There is no privity of contract either

express or implied in law, between the principal and his creditor in such a case.—*ib.* *Per Nisbet, J.* 150

within the intent and meaning of said act.—*Davis et al. vs. Anderson et al.* 193

7. The action for money had and received, has been of late years extended on the principle of its being like a bill in equity; and therefore, in order to recover, on a count for money had and received, the plaintiff must show that he has equity and conscience on his side, and that he could recover it in a court of equity.—*Warner, J.'s, dissenting opinion in Whitehead vs. Peck,* 153

2. But a mortgage, executed by a debtor, in insolvent circumstances, to a creditor, to secure the payment of a *bona fide* pre-existing debt, is not *per se* fraudulent, as against creditors.—*ib.* 193-4

8. The payment of the money by B. to P., having been subsequently, adopted and ratified by W. and B. reimbursed therefor, W. was entitled both in law and equity to recover the amount of usurious interest from P. who received it, equally as if the money had been paid directly by W. to P., out of his own hands.—*ib.* 155

3. A mortgage in Georgia is nothing more than a *security* for the payment of a debt; and the title to the mortgaged property remains in the mortgagor, until foreclosure and sale, in the manner pointed out by statute.—*ib.* 193-4

9. Where the surety pays, it is, in contemplation of law, a payment made for the principal debtor, and he may recover it in an action against the principal for so much money paid for his use.—*ib.* 155-6

4. Upon a rule to foreclose a mortgage under the statute of Georgia, the mortgagor may plead usury, &c.—*Bailey vs. Lumpkin.* 403-5

10. If parties think proper to treat property delivered in payment, and received as cash, they have a legal right to do so, and such payment in judgment of law, will be considered as a cash payment.—*ib.* 155

MURDER AND MANSLAUGHTER.

1. Upon trial of indictment for murder, the jury may find the prisoner guilty of the lesser offence of manslaughter, either voluntary or involuntary, and the verdict will be legal though there be no count for manslaughter in the indictment.—*Reynolds vs. The State,* 227

N.

NEW TRIAL.

11. The money which P. received from B., over and above the principal and lawful interest, was, in legal contemplation, W.'s money, paid by B. to P., for him, and which in equity and good conscience P. ought to refund, and the law raises an assumpsit in favor of W., and creates a privity of contract between P. and W., which authorizes W. to recover in this form of action.—*ib.* 156

1. In application for new trial, a brief of the testimony approved by the court, or agreed upon by the parties or their counsel, must be filed; and such approval or agreement, as the case may be, must be entered upon the minutes, at the term at which the judgment is rendered, and the rule for new trial is applied for.—*Graddy vs. Hightower et al.* 254

MORTGAGE.

1. A mortgage would be obnoxious to the provisions of the act of 1818, and void, if used as an instrument of fraud, for the purpose of securing to the mortgagor a secret trust or benefit,

2. A rule *nisi* for a new trial will not be granted, in this State, at the instance of a party, unless application is first made during the term at which the judgment was rendered, and unless such application appear upon the minutes of that term.—*ib.* 254-5

3. The judge may make rules for

trials returnable in vacation, in cases where the application has been first made and recorded; and where the record shows that such rule is made so returnable in vacation.—*ib.* 254-5

4. Where the term of the court wherein the judgment was rendered has passed, and no application made and recorded at that term, the record in the cause having been finally made up, the court has no power to grant a new trial, except in some peculiar and extraordinary cases.—*ib.* 253
5. Another judge than the one who presided on the trial of the cause, may preside on the motion for a new trial. It is desirable, however, unless prevented by providential cause, to submit the brief of the testimony to the judge who tried the case, to be revised and approved of by him.—*Field vs. Thornton,* 309
6. A case upon a new trial, after a verdict by a *petit jury*, or a confession of judgment, upon the *first trial*, is in the nature of an *appeal*, and is to be regulated by the rules of practice which are applicable to appeals; and either of the parties litigant may make any amendment of the declaration or answer they may deem necessary.—*ib.* 310
7. The Supreme Court will not send a cause back for a rehearing, because of the admission of illegal testimony, if, wholly irrespective of that testimony, there was plainly and obviously proof sufficient to justify the finding.—*Stephens et al. vs. Crawford, Gov., use, &c.* 580
8. The Supreme Court will not grant a new trial in a criminal cause, unless some principle of law has been clearly violated, or where there is manifestly *no evidence* to sustain the verdict; the more especially when the presiding judge in the exercise of his discretion, has refused the application in the court below, when all the circumstances attending the trial must have been fresh in his recollection.—*Jones vs. The State.* 618
See also *Stephens et al. vs. Crawford, Gov., use, &c.* 580

NOTES, BILLS, &c.

1. A note to be negotiable by endorsement, so as to give a right of action to the endorsee in his own name, must contain negotiable words giving it a transferrable quality. It must be payable to the payee, or his *order or assigns, or to bearer*, in pursuance of the statute of Anne.—*Reed, use, Holley vs. Murphy.* 237-8
2. A note without such negotiable words, is a valid instrument as between the original parties, and is entitled to the allowance of the *three days of grace*, and may be declared on, as a promissory note, within the statute. But it cannot be transferred or negotiated, so as to enable the assignee to sue upon it in his own name.—*ib.* 237-8
3. The title of a holder of a note, bill, &c., payable to bearer, or to order, and endorsed in blank, cannot be questioned, in a suit in his name, unless the defence, as against the true owner, if sued in his name, make it necessary.—*Nisbet vs. Lawson.* 284
4. As between the holder of a banker's check and the endorser, it ought to be presented for acceptance with due diligence. But as between the holder and the drawer, a demand at any time before suit brought will be sufficient, unless it appears that the drawee has failed, or the drawer, in some other manner, has sustained injury by the delay.—*Daniels vs. Kyle & Barnett.* 305-6
5. Although an instrument contains at the foot of it, a memorandum specifying the mode in which it may be discharged, still, if it be for a sum certain, payable absolutely and unconditionally, on a day fixed on the face of it, it is a good negotiable promissory note, and may be declared on as such.—*Pool vs. McCrary.* 321

NOTICE.

1. The drawer of a banker's check is not entitled to notice of its dishonor in a suit against him by the holder.—*Daniels vs. Kyle & Barnett.* 305

2. An endorser is entitled to such notice.—*ib.* 306

3. A notarial certificate, which states that a draft was presented at maturity, and payment demanded and refused for want of funds, and that due notice of the non-payment was given on the same day to all the parties concerned, is sufficient notice of the dishonor thereof.—*Field vs. Thornton.* 310-12

4. No particular form of notice is necessary; it will be deemed sufficient if it put the party on his guard who is to be affected by it.—*ib.* 310

5. In a suit by the Central Bank, no proof of notice, demand or protest, is necessary to charge the endorser.—*Merchants' Bank vs. Central Bank,* 432

See also *Central Bank vs. Whitfield.* 594

O

OFFICE PAPERS.

1. The 49th rule of practice of the Superior Courts providing for establishing *instantly* any lost original declaration, plea, indictment, or other office papers, was designed to embrace the pleadings in the case, and such other papers as belong to the office of the clerk of the Superior and Inferior Courts, as papers of file.—*Bryant, guardian, &c., and Beall, Exor. of Pye, vs. Owens and Wife.* 368

2. A guardian's bond is not an office paper of the Superior Court, but of the Court of Ordinary.—*ib.* 368

P

PARDON.

1. So far as the public is interested in a fine imposed, the Executive remission has the effect to restore it to the individual fined, although it has been paid over to the Attorney or Solicitor-General, and by him to the County Treasurer, before the Executive pardon was granted.—*In the matter of the Attorney-General.* 607-10

PARTIES.

1. Who may be parties plaintiffs in action, upon negotiable paper, see *Field vs. Thornton*, 312-14; *Nisbet vs. Lawson.* 284

2. The entry of "*parties made*," on the motion docket, in a case where a *scire facias* to make parties, has been issued and returned *executed*, is insufficient to make the representatives of the deceased plaintiff or defendant parties in the cause.—*Bryant, Guardian, &c., and Beall, Exor. of Pye, vs. Owens and Wife.* 367

3. In such case, there must be a judgment of the court rendered, and entered upon the minutes, before the representatives of the deceased party can be compelled to appear or answer as parties in the cause.—*ib.* 367

PAYMENT—*Application of.*

1. The general rule is, where there are distinct demands due by the debtor to the creditor, and a payment is made by the debtor, he has the right to direct its application; but if the debtor neglect to make a specific application of the payment at the time, then the right of application devolves on the creditor.—*Rackley vs. Pearce.* 242-3

PENALTY.

1. In the case of a note payable upon time, with interest from date, if not punctually paid, the back interest is not a penalty.—*Alexander vs. Trouman.* 475

PLEADINGS.

1. The judiciary act of 1799 requires of the plaintiff that he file his petition in writing, which shall contain the charge, allegation, or demand, plainly fully and distinctly set forth. And of the defendant, that he shall, on or before the last day of the Term to which the petition is returnable, make his defence or answer in writing, which shall plainly fully and distinctly set forth the cause of his defence; held that evidence of illegality of consi

ration could not be admitted under the plea of the general issue.—*Johnson et al. vs. Ballingall.* 70

2. Also, that under the general issue, evidence of a special contract made with the plaintiff, exempting the defendants from liability, is inadmissible.—*Buchannon et al. vs. Jones.* 257

3. In the plea of usury, the time when the original loan was negotiated, as well as the amount of usury taken and reserved, are material facts.—*Winkler vs. Scudder.* 134

4. In a proceeding under the act of 1841, giving to all persons employed on steamboats and other water-craft, on the Chattahoochee, Altamaha, and Ocmulgee rivers, a lien on such steamboats or water-craft, &c.; held, a petition setting forth all the necessary facts, verified by the affidavit of the party, would be a convenient and correct form of pleading.—*Robinson vs. Steamer Lotus, and Owners.* 317-19

PRACTICE.

1. What shall or shall not work a discontinuance of a cause, see *Nisbet vs. Lawson.* 279

2. For what necessary to make parties upon return of *scire facias*, see *Bryant, Guardian, &c., and Beall, Exor. of Pye, vs. Owens and Wife.* 367

PRECEDENTS.

1. For compendious forms in assumpsit and debt, see *Mahaffey vs. Petty et al.* 265

PRESENTMENT—of a Grand Jury.

1. An indictment founded upon presentment of a Grand Jury need not be sent again before that body, for its action thereon.—*Nunn vs. The State.* 245

2. It is the duty of the clerk to spread out in full upon the minutes of the court, every presentment of the Grand Jury.—*ib.* 245

PRINCIPAL AND AGENT.

1. The doctrine that the principal is not liable to one agent or employee, for damages occasioned by the negligence or misconduct of another agent or employee, is not applicable to slaves.—*Scudder vs. Woodbridge.* 198-200

PRICE—Cash and Credit.

1. When it appeared that the plaintiff, in a suit for the price of lumber delivered, had a cash and credit price, and the usual term of credit had expired before suit, it was held that he might recover the credit price, though the lumber was charged in the bill of particulars at the cash price, under the expectation that the account would be paid when presented.—*Taylor vs. Tucker.* 235

PURCHASER.

1. It does not lie in the mouth of a purchaser at sheriff's sale, with full and explicit knowledge of a lien, to contest its validity, or to claim exemption from its operation.—*Per Lumpkin, J., in Tuttle vs. Walton.* 53

R

RAILROAD COMPANIES.

1. Where a railroad company claimed the right to deviate from the original route surveyed for their road, and specially designated in a deed of conveyance made by the plaintiff to them, granting the right of way through his land, in locating their road under the clause in their deed, containing the following words: "With liberty to make such slight alterations in the route now surveyed, as not materially to change the route now surveyed," it was held, in a controversy between the plaintiff and the company, as to whether the road was located on the land conveyed by the deed of the plaintiff, that the latter might give in evidence on the trial, the situation, value, and condition of the land over which the original route was surveyed, and described in the deed, as well as that over which the road was al-

- ly located, for the purpose of showing the *materiality* of the variation, as affecting the rights of the respective parties.—*Doe ex dem. Carr vs. the Georgia R. R. and Banking Co.* 530-7
2. When a statute granting a charter to a railroad company, provides for the assessment of damages in a summary way, to be paid to the landholder whose private property shall be taken for the use of the road, there being no negative words in the statute, express or implied, the landholder whose property is thus taken, is not deprived of his common-law remedy, to recover damages therefor: the statute creates no new right, and being in derogation of a common-law right, must be strictly construed; the summary remedy given by the statute is *cumulative* only.—*ib.* 530-7
 3. Private property cannot be taken for public use, without a just compensation; and where a railroad charter provides adequate security shall be given to the landholder whose property shall be taken for the use of the road, for the payment of such damages as shall be assessed in the manner pointed out thereby, no title to the land thus taken, vests in the company, nor can the company appropriate the same to the *exclusive* use of the road, so as to defeat the right of the landholder to maintain trespass in ejectment therefor, until such adequate security shall be given; and it is incumbent on the defendants to allege in their plea, and prove at the trial, the provisions of their charter in that respect, have been strictly complied with, before the landholder can be deprived of his title to his property, for the use of the public.—*ib.* 530-7
 4. The 11th section of the charter of the Monroe Railroad and Banking Company, gives to bill-holders a paramount lien for the payment of their bills, upon that part of the road only which was built by the company.—*Collins vs. The Central Bank et al.* 455
 5. Such portion of the road as was built by the contractors, under a mortgage thereon, to secure them for the work done, and materials and equipments furnished, is liable to them, and their lien is paramount to that of bills or notes; the lien of the latter only attaching upon such portion of the road as was built by the company.—*ib.* 455-9
- S**
- SALE.
1. An executor under a will authorizing a sale of testator's property, without specifying the manner, may sell privately, without any previous advertisement of such intended sale, or leave of the Court of Ordinary, and the purchaser will acquire a good title, even as against the creditors of the testator, provided the purchase is *bona fide*, and without fraud on the part of the purchaser.—*Bond and Murdock et al. vs. Zeigler et al.* 343-7
 2. The purchaser in such case, is not bound to see to the proper application of the purchase money by the executor. "What becomes of the price is no concern to him." Nor is he required before buying, to look into the accounts of the executor, to ascertain that he is faithfully administering his trust. The law presumes this in favor of the executor. But in all cases where the sale is infected with *fraud* and *covin* between the executor and purchaser, it is absolutely void, and the title to the property remains unchanged.—*ib.* 343-7
 3. A sale of stock by a portion of the stockholders to the rest, is not such a sale by the *corporation*, as will make the purchasers liable to the creditors of the company.—*Berry et al. vs. Matthews et al.* 523
- SCIRE FACIAS AGAINST BAIL.
1. In scire facias against bail, where no plea has been filed, judgment may be rendered *upon motion*, without the intervention of a jury; *aliter*, where defence made.—*Reed vs. Sullivan, Ex'r,* 294

See also *Garvin vs. Gallagher*, 316

2. The service of scire facias against bail in Georgia, is very much as in England; as for example, if the defendant cannot be found, return of two *nils* will authorize farther proceedings. If he fail to appear after service, or after return of two *nils*, or appearing fails to plead, judgment may be entered up against him.—*ib.* 294

3. A scire facias against only one defendant as bail, issued by the clerk of one county, and directed to the sheriff of another, is bad, and will be quashed upon motion.—*Garvin vs. Gallagher*, 315-16

4. A scire facias against bail is not such an original suit, within the meaning of the constitution of Georgia, as to require it to be instituted in the county of the bail's residence.—*ib.* 316

SCIRE FACIAS TO MAKE PARTIES.

1. Judgment upon the return of the scire facias must be rendered and entered upon the minutes. An entry on the motion docket of "parties made" is insufficient.—*Bryant, Guardian, &c. and Beall, Ex'r of Pye, vs. Owens and Wife*, 367

SECURITIES.

1. If a security have knowledge of usury in the contract, and voluntarily pay it, he cannot afterwards recover it of his principal.—*Whitehead vs. Peck. Per Nisbet, J.* 150

2. Neither the act of 1826, 1831, 1839, 1840 or 1841, passed for the relief of securities and endorsers, gives the control of executions to endorsers who have paid off the same, against prior endorsers, except such executions as have issued on judgments founded on bankable instruments.—*Evans vs. Rogers*. 467-8

SECURITIES OF ADMINISTRATORS.

1. The liability of the securities of an administrator is an ultimate liability,

not primary.—*Cameron et al. vs. Justices, &c.*

2. No recovery can be had upon an administration bond against the securities, at the suit of a creditor, until *devastavit* against the administrator first established according to law *ib.*

SECURITIES ON APPEAL.

1. A security on appeal may be discharged and others substituted, with a view to render him a competent witness, at the instance of the appellant.—*Davis et al. vs. Anderson et al.* 192

2. The motion for substitution being made by the parties for their benefit they could not take advantage of it and the order of the court entered upon the minutes would make the record sufficiently intelligible.—*ib.* 192-

SECURITIES OF GUARDIANS.

1. The discharged security of a guardian is only released from the future, not from the past liabilities of his principal. The substituted security is liable both for the past and future.—*ib.* 87

2. The Court of Ordinary has no power to discharge a security to a guardian's bond from a liability already incurred by the guardian.—*The Justices, &c. vs. Woods and Vason*. 87-8

3. The security of a guardian may be discharged by the Court of Ordinary under the act of 1805. But in the exercise of this power, the law presumes that the court will so act as not to injure, but to protect the rights of the ward.—*Bryant, Guardian, &c., and Beall, Exor. of Pye, vs. Owens and Wife*. 371

4. A security so discharged is released from all future but not from any past liability. If new security is given, he is bound for the future management of the ward's estate, and also, equally with the discharged security, for any past liability of the guardian.—*ib.* 371

5. In a suit against a discharged security on a guardian's bond, the plaintiff must prove affirmatively some default or act of *malfeasance* on the part of the guardian, prior to the discharge of the security, which in law would constitute a breach of the bond. Evidence of the bare reception, by the guardian, of his ward's estate, and nothing more, is insufficient to charge the security.—*ib.* 91

6. Where the security pleads and proves his discharge by the Court of Ordinary it is incumbent on the plaintiff to reply by proof, some default or *malfeasance*, on the part of the guardian, anterior to a breach of the bond.—*ib.* 89

7. In a case where the decree against the guardian is silent as to the time when the devastavit by him took place, and when the security was discharged by the Court of Ordinary, before the commencement of the suit in equity, in which the decree was rendered, the decree alone is insufficient to charge the security in a suit against him on the guardian's bond. *Aliter*, when the security has not been discharged.—*Bryant, Guardian, &c., and Beal, Executor of Pye vs. Owens and Wife*, 372-5

SETS-OFF.

1. The excess of usury, over and above principal and legal interest, may be pleaded by way of set-off to an action instituted by the lender against the borrower, in any case where the plea of set-off would be admissible under the law.—*Rackley vs. Pearce*, 242-3

2. A debt, which accrued in the lifetime of the testator or intestate, cannot be set-off against a debt which accrues to the executor or administrator after the death of the testator or intestate.—*Mills et al. vs. Lumpkin, Administrator*. 513-14

3. With regard to sets-off, courts of equity follow the law, unless when some peculiar equities intervene between the parties.—*ib.* 513-14

SHERIFFS.

1. Where a former sheriff is in custody under attachment, and the present sheriff, in answer to a rule to produce the body, shows for cause why he cannot, that the defendant has escaped from jail without his permission or any negligence on his part, it is competent for the party moving, under the act of 1840, (authorizing the returns of sheriffs, constables, coroners, and justices of the peace, to be traversed,) to controvert the return.—*Craig et al. vs. Maltbie*, 545-7

2. If it is admitted to be true, or found so by a jury, upon issue submitted for that purpose, that the sheriff suffered a prisoner in custody under an attachment to go at large in the jail, with a full knowledge that there was a breach in the wall of one of the rooms, through which he could and did escape, the sheriff is liable to an attachment, and the party injured will not be driven to his action for an escape.—*ib.* 547-9

3. A sheriff is liable to be attached for the failure of his deputy, to pay over money collected on an execution, by him.—*In the matter of John S. Stephens*, 587-91

SLANDER.

1. To call a woman a whore in this State is actionable.—*Pledger and Wife vs. Hathcock*, 550-1

SLAVES.

1. The employee of a slave is liable in damages to the owner, if such slave be killed or injured, by the negligence or unskillfulness of other agents or employees of the defendant engaged in the same service.—*Scudder vs. Woodbridge*, 198-9

STATUTES.

1. When the provisions of a later statute are opposed to those of an earlier, the last mentioned must be

- considered as repealed.—*Harrison et al. vs. Warner*. 35
2. A statute repealing a former statute, being itself repealed, the first statute is revived.—*ib.* 34
3. When there are different statutes *in pari materia*, though made at different times, and even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.—*ib.* 35
4. The Act of June, 1806, providing that when any action shall be instituted within time, and the plaintiff be nonsuited, or shall discontinue the same, after the time of limitation is expired, he shall be permitted to renew his action within six months thereafter, once only and not after, was repealed by the act of December of the same year.—*ib.* 35
5. Statutes requiring certain liens to be registered are in derogation of the common law, and cannot be extended by implication to other liens than those specified.—*Per Warner, J., in Tuttle vs. Walton*, 51
6. In the construction of a statute, when the words of the enacting clause are clear and positive, recourse must not be had to the title or the preamble. They serve to assist in removing ambiguities, where the intent is not plain and manifest.—*Eastman et al. vs. McAlpin*, 171-2
7. The act of 1843, amendatory of the act of 23d December, 1840, to define the liabilities of the several Railroad Companies in Georgia, for the loss of stock killed, or wounded by the running of cars or locomotives, on their roads, and to regulate the mode of proceeding in such cases, is prospective in its operation, and cannot be applied to cases arising anterior to its passage.—*Girtman vs. The Central Railroad and Banking Company*, 176
8. Before the enactment of said statute, the Justices' Courts had no jurisdiction sounding in damages, for any trespass on the person or property.—*ib.* 176
- STATUTES—*English, of force.*
1. The statute of 24 Geo. 2, ch. 44, sec. 1, is of force in the State of Georgia.—*Warthen vs. May*. 604-5
- T.
- TRIAL.
1. Where one of three defendants, jointly indicted, elects to be tried *separately*, under the provisions of the penal code, the trial, as to him, is to be considered in the same manner as if he had been separately indicted for the offence.—*Jones vs. The State*, 616-18
2. When defendants, jointly indicted, elect to be tried separately; it is the privilege of the prosecuting officer, who asserts the affirmation as to their guilt, to determine which of them he will first put on trial.—*ib.*, 616-18
3. For New Trials, see—*ib.*, 618
Also, *Graddy vs. Hightower et al.*, 254-5
Field vs. Thornton, 309-10
Stephens et al. vs. Crawford, Gov., use, &c., 580
- TROVER.
1. A plaintiff in trover for certain slaves required bail under the second section of the act of 1821, entitled An act to quiet and protect the possession of personal property, and to prevent taking possession thereof by fraud or violence. The defendant was arrested, and the slaves seized by the sheriff, under the process; and, being unable to give security under the act, the plaintiff thereupon gave security under another provision of the same act, and received from the sheriff the possession of the slaves sued for: Afterwards, and without any trial, dismissed his action of trover, still retaining the possession of the slaves thus obtained. The plaintiff then sued the former plaintiff in trover for the same slaves, and insist-

ed that his possession, obtained as aforesaid, was tortious: *Held* that said possession was not tortious, but was a lawfully acquired possession under said act.—*Smith vs. Kershaw*, 259-61

2. To enable a plaintiff to maintain *trover*, he must have either a general or special property in the chattel: the actual possession or the right of possession.—*Liptrot, adm'r, vs. Holmes*, 388 *et seq.*

3. On the death of a *feme covert* intestate, her separate estate vests in her legal representative; and he can maintain *trover* therefor, even where there has been a trustee appointed, for the sole purpose of protecting such property against the marital rights of the husband, during the coverture; the trust being considered as *executed* whenever the coverture ceases to exist.—*ib.* 388-392

4. The action* of *trover* being founded on a conjunct right of property and possession, any act of the defendant which negatives, or is inconsistent with, such right, amounts in law to a conversion.—*ib.* 391-2

U.

USURY.

1. In the plea of Usury, the sum loaned, the time when it took place, and the amount of usury taken and received, are material facts.—*Winkler vs. Scudder*, 134

2. All usurious contracts in Georgia, under a just construction of the act of 1822, are void as to the legal and usurious interest.—*ib.*, 135

3. In a suit upon a usurious contract, payments proved to have been made, the usury being established, will be deducted from the principal sum originally loaned.—*ib.*, 135

4. Usury paid by a surety may be recovered back by him in an action for money had and received, but not by the principal, though he has reim-

bursed the security.—*Per Nisbet, J., in Whitehead vs. Peck*, 150

5. If the surety have knowledge of the usury, and voluntarily pay it, he cannot afterwards recover it of his principal.—*ib.*, 150

6. Excess of usury over and above the principal and legal interest, voluntarily paid, may be recovered back, or under proper circumstances, it would be a good defence under a plea of set-off.—*Rackley vs. Pearce*, 242-3

7. The plaintiff had two notes of the defendant, the one infected with usury, and the other not. The defendant paid \$1,800, out of which the usurious note was extinguished, and the balance applied to the note not thus tainted with usury, which was afterwards renewed at 16 per cent. In a suit upon the last-mentioned note the usury paid upon the first cannot be withdrawn and applied as a credit under a plea of payment.—*Rackley vs. Pearce*, 242-3

8. Upon a rule to foreclose a mortgage, the mortgagor may show, by way of defence, that the contract upon which it was given was usurious.—*Bailey vs. Lumpkin*, 403-5

9. Neither legal nor usurious interest can be recovered at law, in Georgia, upon a contract tainted with usury.—*ib.*, 406-7

10. A security infected with usury is void in Georgia, *quoad* the legal interest together with the usury, even in the hands of an innocent holder without notice.—*ib.*, 407-8

11. The maker of a usurious note is not barred of the defence of usury, by *standing by* when it was transferred to an innocent holder, and not disclosing the fact of the usury.—*ib.*, 408-9

12. In a case where the original transaction was usurious, and several renewals have taken place, and part of the interest reserved has been paid, the infection of usury follows all the se-

curities given in renewal for the same debt, however varied in form and amount, and the amount paid on such renewals must be deducted from the original amount loaned.—*ib.*, 409

13. Usurious contracts may be purged; as, for example, where there is an accounting between the parties to a usurious contract, and all sums previously paid usuriously are deducted, and a new security given for the balance, the contract is said to be purged, and the last security taken is valid.—*ib.*, 410

14. In the case of a note given by way of renewing and continuing an original contract for a usurious loan, the mere change of securities does not purge it of the usury.—*Hammond et al. vs. Buys*, 417

15. But if A, as the maker of a usurious note, is about to pay it up to B, the payee and holder, and C, for the purpose of using the money for his own benefit, borrows A's note from B, and gives B his (C's) own note, with A as his security—there being no usury in the transaction between B and C—the note of C, with A, security, thus substituted, would not be obnoxious to the statute of usury.—*ib.*, 417

W.

WARRANTY.

1. In the case of a warranty it is not necessary that there should be a recovery against the warrantee by his vendee, in order to entitle him to sue his vendor on the warranty.—*Broughton vs. Badgett*, 77
2. A warranty in a bill of sale is not negotiable by endorsement so as to vest in the endorsee a right of action upon it.—*ib.*, 76-7

WILLS.

1. Where a testator bequeathed to his daughter certain negroes "during her natural life, and the heirs of her body forever," held that the words must receive their technical signification,

there being nothing in the will to authorize the belief, that the testator may have used the words improperly, and not in their lawful meaning.—*Choice vs. Marshall*, 102

2. In the construction of wills, the intention, so far as it is consistent with the laws of the land, shall govern.—*ib.*, 102

3. For the doctrine of election, see *McGinnis vs. McGinnis*, 501-1

WITNESS.

1. By the common law of England, of force in this state under our adopting statute of 1784, all sane persons are competent witnesses, unless interested or infamous.—*Winkler vs. Scudder*, 132

2. The maker of a note (who is released) is a competent witness to prove usury in its consideration, in a suit by an endorsee against an endorser.—*ib.*, 123 to 133

3. In order to impeach a witness, by showing that he has made contradictory statements, it is not necessary that he absolutely deny the declaration imputed to him. It may be done when he says, "he does not recollect," if the subject matter of such conversations be relative to the issue.—*Sealy vs. The State*, 218-19

4. Witnesses who testify as to what they saw respecting a transaction, after night and by star-light, aided by lamps upon the surrounding buildings, cannot be impeached by persons who propose to prove that they have made experiments on other nights, between the same hours, and with the same degree of light, and were unable to discern objects accurately.—*Sealy vs. The State*, 220

5. In a suit against the security alone, the principal is interested to the extent of the costs, and therefore is not a competent witness for the security, unless released from liability as to such costs.—*Rackley vs. Sanders and Sanders*, 258-9

6. Endorser not competent witness in a suit by client against attorney for money collected, unless released from liability under his endorsement.—*Nisbet vs. Lawson.* 282-3
7. The true test of the interest of a witness is, that he will either gain or lose by the *direct legal operation* of the judgment, or that *the record will be legal evidence for or against him*, in some other suit.—*Bailey vs. Lumpkin.* 403
8. When several defendants are included in the same indictment, and they elect to be tried separately, those not upon trial are competent witnesses for their accomplices to prove their innocence.—*Jones vs. The State.* 616-18



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